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ABSTRACT

The hearings recorded here were convened in order to examine legislation proposed in response to the Supreme Court's decision in Grove City College v. Bell, which was considered to narrow significantly the scope of coverage of Title IX of the 1972 Education Amendments, Title VI of the 1964 Civil Rights Act, Section 504 of the 1973 Rehabilitation Act, and the 1975 Age Discrimination Act. Committee members expressed concern that the Supreme Court's interpretation of the language set forth in these statutes might prevent continuation of "two decades of enforcement by four presidents of both parties." The proposed legislation was offered to reaffirm that enforcement record. Testimony for and against the bill was given by government officials, legislators, educators, and representatives of various civic organizations. (RDN)

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CIVIL RIGHTS ACT OF 1984

JOINT HEARINGS

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR

AND THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 5490

TO CLARIFY THE APPLICATION OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, SECTION 504 OF THE REHABILITATION ACT OF 1973, THE AGE DISCRIMINATION ACT OF 1975, AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

HEARINGS HELD IN WASHINGTON, DC,
ON MAY 9, 15-17, 21, 22, 1984

Serial No. 70

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CIVIL RIGHTS ACT OF 1984

WEDNESDAY MAY 9, 1984

HOUSE OF REPRESENTATIVES,
COMMITTEE ON EDUCATION AND LABOR, AND
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
Washington, DC.

The joint committees met, pursuant to call, at 11:15 a.m., in room 2141, Rayburn House Office Building, Hon. Paul Simon presiding.

Members present: Representatives Perkins, Simon, Murphy, Schroeder, Hayes, Penny, Jeffords, Sensenbrenner, Coleman, Petri, Gunderson, Chandler, and DeWine.

Staff present: John F. Jennings, majority associate general counsel, and Electra C. Beahler, minority counsel for education, Education and Labor Committee; William A. Blakey, majority counsel, Subcommittee on Postsecondary Education; and Catherine A. Leroy, majority counsel; Ivy L. Davis, majority assistant counsel, and Philip Kiko, minority associate counsel, Subcommittee on Civil and Constitutional Rights.

[Text of H.R. 5490 follows:]

98TH CONGRESS
2D SESSION

H. R. 5490

To clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

IN THE HOUSE OF REPRESENTATIVES

APRIL 12, 1984

Mr. SIMON (for himself Mr. EDWARDS of California, Mr. FISH, Mr. COLEMAN of Missouri, Mr. DIXON, Mr. GARCIA, Mr. MILLER of California, Mr. RODINO, Mrs. SCHNEIDER, Mrs. SCHROEDER, Mr. CONABLE, Mr. AUCOIN, Mr. BOEHLERT, Mrs. BOXER, Mrs. BURTON of California, Mr. CARPER, Mr. CHANDLER, Mr. CLINGER, Mr. CONYERS, Mr. COUGHLIN, Mr. CROCKETT, Mr. D'AMOURS, Mr. DORGAN, Mr. DWYER of New Jersey, Mr. DYMALLY, Mr. EDGAR, Mr. FOGLIETTA, Mr. GILMAN, Mr. GLICKMAN, Mr. GREEN, Mr. GUARINI, Mr. GUNDERSON, Mrs. HALL of Indiana, Mr. HORTON, Mr. HOWARD, Mr. HOYER, Mr. HUGHES, Mr. JEFFORDS, Mrs. JOHNSON, Mrs. KENNELLY, Mr. LEATH of Texas, Mr. LEHMAN of California, Mr. LONG of Louisiana, Mr. MCKERNAN, Mr. MCKINNEY, Mr. MARKEY, Mrs. MARTIN of Illinois, Mr. MAVROULES, Mr. MINETA, Mr. MITCHELL, Mr. MOLINARI, Mr. MOODY, Mr. MRAZEK, Mr. OWENS, Mr. PEPPER, Mr. PRITCHARD, Mr. RANGEL, Mr. SCHUMER, Mr. SHANNON, Ms. SNOWE, Mr. STARK, Mr. SWIFT, Mr. TAUKE, Mr. TOWNS, Mr. VENTO, Mrs. VUCANOVICH, Mr. WEBER, Mr. WEISS, Mr. WHEAT, Mr. WILLIAMS of Montana Mr. WOLPE, and Mr. YATES) introduced the following bill; which was referred jointly to the Committees on Education and Labor and the Judiciary

---

A BILL

To clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1984".

SEC. 2. (a) The matter preceding clause (1) of section 901(a) of the Education Amendments of 1972 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "in" the second time it appears;

(2) by striking out "the benefits of" and inserting in lieu thereof "benefits"; and

(3) by striking out "under any education program or activity receiving" and inserting in lieu thereof "by any education recipient of".

(b) Section 901(c) of the Act is amended by inserting "(1)" after the subsection designation and by adding at the end thereof the following new paragraph:

"(2) For the purpose of this title, the term 'recipient' means—

"(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

(c)(1) The first sentence of section 902 of the Act is amended—

(A) by striking out "to any education program or activity" and inserting in lieu thereof "for education"; and

(B) by striking out "such program or activity" and inserting in lieu thereof "recipients".

(2) The third sentence of section 902 of the Act is amended—

(A) by striking out "under such program or activity";

(B) by striking out "to whom" each time it appears in clause (1) and inserting in lieu thereof "to which" each such time;

(C) by striking out "program, or part thereof, in which" and inserting in lieu thereof "assistance which supports"; and

(D) by striking out "has been so found" and inserting in lieu thereof "so found".

(3) Section 903 is amended by striking out "1002" and inserting in lieu thereof "902".

SEC. 3. (a) Section 504 of the Rehabilitation Act of 1973 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "his" and inserting in lieu thereof "such individual's";

(2) by striking out "in" the third time it appears;

(3) by striking out "the benefits of" and inserting in lieu thereof "benefits";

(4) by striking out "under any program or activity receiving" and inserting in lieu thereof "by any recipient of"; and

(5) by striking out "under any program or activity conducted".

(b) Section 504 of the Act is further amended by inserting "(a)" after the section designation and by adding at the end thereof the following new subsection:

"(b) For the purpose of this section, the term 'recipient' means—

"(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

(c) Section 505(a)(2) of the Act is amended by inserting ", as amended," after "1964".

SEC. 4. (a) Section 302 of the Age Discrimination Act of 1975 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "in programs or activities receiving" and inserting in lieu thereof "by recipients of"; and

(2) by striking out "programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.)" and inserting in lieu thereof "recipients of funds under chapter 67 of title 31, United States Code".

(b) Section 303 of the Act is amended—

(1) by striking out "in" the second time it appears;

(2) by striking out "the benefits of" and inserting in lieu thereof "benefits";

(3) by striking out "under, any program or activity receiving" and inserting in lieu thereof "by any recipient of".

(c)(1) Section 304(a)(4) of the Act is amended by striking out "to any program or activity".

(2) Section 304(b)(1) of the Act is amended—

(A) by striking out ", in the program or activity involved";

(B) by striking out "operation" in clause (A) and inserting in lieu thereof "operations of the recipient"; and

(C) by striking out "of such program or activity" in clause (A) and inserting in lieu thereof "in furtherance of which the Federal financial assistance is used".

(3) Section 304(c)(1) of the Act is amended by striking out "any program or activity receiving".

(d)(1) Section 305(a)(1) of the Act is amended by striking out "under the program or activity involved".

(2)(A) The second sentence of section 305(b) of the Act is amended by striking out "the particular program or activity, or part of such program or activity, with respect to which such finding has been made" and inserting in lieu thereof "assistance which supports the noncompliance so found".

(B) The third sentence of such section is amended to read as follows: "No such termination or refusal shall be based in whole or in part on any finding with respect to any noncompliance which is not supported by such assistance.".

(3) Section 305(e)(1) of the Act is amended by striking out "Act by any program or activity receiving Federal financial assistance" and inserting in lieu thereof "title".

(e) Section 309 of the Act is amended by—

(1) by striking out "and" at the end of clause (2);

(2) by striking out the period at the end of clause (3) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding at the end thereof the following new clause:

"(4) the term 'recipient' means—

"(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

SEC. 5. (a) Section 601 of the Civil Rights Act of 1964 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "in" the second time it appears;

(2) by striking out "the benefits of" and inserting in lieu thereof "benefits"; and

(3) by striking out "under any program or activity receiving" and inserting in lieu thereof "by any recipient of".

(b)(1) The first sentence of section 602 of the Act is amended by striking out "program or activity" each time it appears and inserting in lieu thereof "recipient" each such time.

(2) The third sentence of section 602 of the Act is amended—

(A) by striking out "under such program or activity" in clause (1);

(B) by striking out "to whom" each time it appears in clause (1) and inserting in lieu thereof "to which" each such time;

(C) by striking out "program, or part thereof, in which" in clause (1) and inserting in lieu thereof "assistance which supports"; and

(D) by striking out "has been so found" in clause (1) and inserting in lieu thereof "so found".

(c) Title VI of the Act is amended by adding at the end thereof the following new section:

"Sec. 606. For the purpose of this title, the term 'recipient' means—

"(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.”.

Mr. SIMON. The joint hearing of the Judiciary Subcommittee and the Education and Labor Committee will come to order. I am temporarily taking the Chair for Don Edwards and Carl Perkins. The two Chairs are tied up in the Democratic Caucus on another civil liberties matter. We will enter their statements in the record, and they may wish to deliver them.

[Opening statement of Congressman Edwards follows:]

OPENING STATEMENT OF HON. DON EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA AND CHAIRMAN, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

It is hard to believe that racial apartheid was practiced throughout this country just 20 years ago and that such practices were supported with federal dollars. With adoption of Title VI of the 1964 Civil Rights Act, Congress declared its national policy that federal funds would not be used to support racial discrimination. Congress extended that policy to ban federal support of discrimination based on sex, handicap and age.

The committees on Judiciary and Education and Labor come together at this time because this national resolve has been severely undermined by the Supreme Court's decision in *Grove City College* v. *Bell.* Unless the Congress acts, the decision will significantly narrow the scope of coverage, not only Title IX of the 1972 Education Amendments but Title VI of the 1964 Civil Rights Act, section 504 of the 1973 Rehabilitation Act and the 1975 Age Discrimination Act.

It is the intent of H.R. 5490 to codify two decades of enforcement by four presidents of both parties. The Supreme Court's interpretation of the language set forth in these statutes prevents continuation of that enforcement record. Our changes reaffirm that record of enforcement. To put us back to where we were before *Grove City,* we must provide for broad coverage and we will limit the fund termination to those funds which are actually supporting the discrimination found.

As President Kennedy noted in proposing Title VI "(S)imple justice requires that public funds to which all taxpayers . . . contributed not be spent in any fashion which encourages, entrenches, subsidizes, or results in . . . discrimination."

As with all civil rights legislation, H.R. 5490 has broad bi-partisan support: 136 members in the House and still rising and in the Senate, S. 2568 has 62 co-sponsors.

Mr. SIMON. Basically why we are holding this hearing is to take a look at H.R. 5490. This is a congressional response to the U.S. Supreme Court decision in *Grove City College* v. *Bell.*

What happened in that decision obviously has implications beyond title IX. I will enter my full statement in the record but won't read it.

We think it has implications also on title VI and of the Civil Rights Act and section 504 of the Rehabilitation Act of 1973. This bill—and I am pleased to be one of the cosponsors—is an attempt to make clear what congressional intent is.

[Opening statement of Congressman Simon follows:]

OPENING STATEMENT OF HON. PAUL SIMON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS AND CHAIRMAN, SUBCOMMITTEE ON POSTSECONDARY EDUCATION

Today the Education and Labor Committee and the Judiciary Subcommittee on Civil and Constitutional Rights begin 6 days of hearing on the Civil Rights Act of 1984, H.R. 5490. This Bill is the Congressional response to the U.S. Supreme Court decision *Grove City College* v. *Bell.*

In that decision, the Court held that a college which receives federal funding in the form of student financial aid to its students, but receives no other federal money, is required to comply with Title IX only in its student financial aid program. Under this holding, despite the receipt of federal funds, the remainder of the institution is free to discriminate on the basis of sex without violating Title IX. In short, after the *Grove City* case there is no longer any federal law which comprehensively prohibits sex discrimination in education.

In *Grove City* the Court ignored the congressional intent and rejected a long history of broad executive branch enforcement of Title IX of the 1972 Education Amendments.

We must correct this result. Although the *Grove City* case only addresses Title IX, it is appropriate that we clarify each of the civil rights laws that are parallel in language and structure. The bill addresses four parallel civil rights statutes: Title IX of the Education Act of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination on the basis of disability) and the Age Discrimination Act of 1975. In fact, officials of both the Department of Education and the Justice Department have expressed their intention to re-write regulations for all four statutes to conform to the narrow Supreme Court decision.

On April 12, 1984, along with Chairman Edwards and 70 Members of the House I introduced H.R. 5490. That legislation now has 129 co-sponsors. The purpose of this bill is to codify the broad coverage intended by Congress and carried out by the executive branch for the past two decades. An identical bill was introduced in the Senate. This bill is intended to reaffirm Congress' intent that assistance flowing from federal tax dollars not be used in any way to foster discrimination.

Let me add one personal note before we begin these hearings. Nothing is more vital to the future of this Nation than that we provide opportunity and justice and see that it is done for those citizens who have not always had either the opportunity or justice. My daughter is one of those who benefitted directly from Title IX. She was the AIAW, Division III High Jump Champion in 1982.

Two of those who have been giants in this Congress over the years, who have contributed the most, are my colleagues, one of whom is the Chairman of the Education and Labor Committee and the other is the the Chairman of the Judiciary Subcommittee. It is an honor to serve with them in the House. I am particularly pleased to be conducting these hearings with these distinguished colleagues, Don Edwards and Carl Perkins.

Mr. **SENSENBRENNER**. Mr. Chairman.

Mr. **SIMON**. Mr. Sensenbrenner.

Mr. **SENSENBRENNER**. Mr. Chairman, I have an opening statement.

I am a cosponsor of this piece of legislation because I strongly believe that the Supreme Court's decision in the *Grove City College* case was far too restrictive and does not enunciate the intent of Congress when title IX was passed about 10 years ago, guaranteeing nonsex discrimination in federally-funded institutions of education.

I do believe that title IX has been effective in reducing the wage gap that we hear much about, wherein women get 62 cents on the dollar of wages for comparable work as members of the male sex.

The efficacy of title IX, I think, is dramatized by the point that the last Census figures indicate that for women under 30, who were the principal beneficiaries of the title IX protections during their education, the figure is 85 cents on the dollar rather than 62 cents on the dollar for comparable wages for society as a whole.

That is why I believe that the letter and the spirit of title IX should remain the law and that *Grove City College* was far too restrictive and a step backward.

At the same time, having expressed my support for this piece of legislation, let me express a word of caution that it will be counterproductive for us to go too far and to extend a very sweeping, broad brush on the title IX legislation. And I would hope that the hearings that this committee will be holding will be able to clarify precisely what the congressional intent is.

For example, it has been brought to my attention that one lawsuit has been filed against the school that does not take Government money, either directly or indirectly, to bring them in under title IX merely because they invited a police officer whose department was funded with Federal funds, to come and give a speech to some elementary school students.

I don't think that was the intent of title IX; I don't think it is the intent of this bill. I would hope that when we mark this bill up there is a very clear and adequate record that indicates that we do intend to reverse the *Grove City College* case but we don't intend to have the fruit of the Government money go to the extent that I have just described.

I thank the chairman for this time and yield back whatever time I have remaining.

Mr. SIMON. Mrs. Schroeder.

Mrs. SCHROEDER. Mr. Chairman, I ask unanimous consent to put my opening statement in the record.

I just want to say briefly that as an original cosponsor of the Civil Rights Act of 1984, I am really pleased that these two committees are being very efficient and productive in meeting together and moving on this because it is terribly important.

All of us were awfully disappointed when the Supreme Court in *Grove City College* v. *Bell* narrowly defined title IX and, therefore, all the other titles that it was drafted around and similar to. That really set back all the gains that Hispanics, women, handicapped, older Americans, and everyone thought they had earned in the last 20 years.

I want to just focus on the specific facts that show you why title IX has been so critical. In order to see how title IX has worked, just look at the facts. First of all, the percentage of women enrolled in 4-year colleges has risen from 43 to 52 percent after the passage of title IX.

If you look at women's sports scholarships in colleges, there were none before title IX. There are now at least 15,000. So we made some great progress there.

And the number of Ph.D's earned by women has risen from 16 to 32 percent, almost doubling.

I could go on and on; and the same is there for the handicapped, for older people, for minorities, and Hispanics. I just think it is wonderful that we are moving so fast. Let's get this back to where we thought it was 20 years ago, and get on with it.

I thank you.

[Opening statement of Congresswoman Schroeder follows:]

OPENING STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

I am proud to be an original sponsor of the Civil Rights Act of 1984. Its expeditious passage is crucial if we are to fulfill the commitment Congress and the American people made twenty years ago in passing the Civil Rights Act of 1964 to prohibit discrimination.

As a member of the House Judiciary Subcommittee on Civil and Constitutional Rights, I have heard testimony during our extensive oversight hearings on the Reagan Administration's enforcement, or lack of enforcement, of our nation's civil rights laws. I fear that armed with their interpretation of the Supreme Court's decision in *Grove City* v. *Bell*, which narrowly defined Title IX's program or activity language so as to exempt entire institutions from its prohibition of sex discrimination, the current Administration could make a shambles of the gains blacks, Hispanics, women, handicapped, and older Americans have made during the last twenty years.

As co-chair of the Congressional Caucus of Women's Issues, I know that Title IX of the Education Amendments of 1972 has been an effective law. Here are three examples:

Since passage of Title IX, the percentage of women enrolled in four-year schools has risen from 43% to 52%, and in two-year schools from 44% to 55%.

Since passage of Title IX, the number of college sports scholarships offered to women has risen to 15,000. Before Title IX, there were none.

Since passage of Title IX, the number of Ph.D.s earned by women has risen from 16% to 31%.

There is still much room for improvement, but if Title IX and the other civil rights statutes are narrowed in scope, that improvement will be severely limited.

It is fraudulent to tell girls and women that they will pay the same taxes as men, so of course they have the same educational opportunities, then when they get to school say "sorry, only the financial aid department has to comply with Title IX."

I would like to congratulate the coalition of organizations supporting the Civil Rights Act of 1984 for choosing to pursue omnibus legislation to correct the *Grove City* decision. I think it sends a message to American people that the pursuit of civil rights for all in this country transcends the special interest of any one constituency. I'm confident that the unity of the various constituencies, and the unity of both parties, will be a big plus for the bill as we try to move it through Congress.

Mr. SIMON. Mr. Coleman.

Mr. COLEMAN. Thank you, Mr. Chairman.

It was just 11 years ago that it was an accepted practice for many colleages and universities to utilize separate, tougher admission standards for female students than for male students. Athletic scholarships were for men only. Female students were channeled into so-called women's fields, with math, science, engineering, law, and medicine left to men.

On the faculties of universities, women professors routinely received lower compensation than similarly qualified male professors.

In short, educational institutions failed to provide women the opportunities they needed to compete on an equal basis with men in our society.

Congress sought to address these inequities in our educational system by passing title IX of the Education Amendments of 1972. The results of title IX have been impressive. Consider, for example, that:

Female enrollment in medical, law, dental and business schools has increased sharply across the country and now reflects the composition of the general population at many institutions.

More than 10,000 athletic scholarships are awarded to women athletes each year, thus encouraging young women athletes at all levels of education to fully develop their potential.

The presumption that women were not suited to certain fields of study has largely been refuted. The Strong Vocational Interest Bank, for example, abandoned its policy of utilizing separate scoring systems for men and women and now judges individuals without regard to sex.

The Supreme Court decision in *Grove City College* v. *Bell* has raised the question of whether or not we are going to continue to pursue the goal of eliminating unlawful discrimination from our educational institutions.

I, for one, regret the court's decision because it will severely limit the effectiveness of existing Federal law as a mechanism for preventing discrimination on the basis of sex, race, handicap or age in postsecondary institutions.

Because of my concerns, I am happy to be a cosponsor of H.R. 5490 and believe that it will effectively resolve the controversies which have arisen over various interpretations of title IX during the last few years.

The bill would require a broad reading of title IX by deleting the references to "program or activity." The effect of this change will be to subject an entire institution or entity to the prohibitions of title IX.

In addition, H.R. 5490 defines the term "recipient" to reflect the broad interpretation of that term found in current title IX regulations.

Finally, the enforcement section is modified to reflect the fact that recipients of Federal aid are subject to title IX in all of their activities. If discrimination is found to exist in any one program or activity, all Federal funds to the school would be terminated.

Mr. Chairman, I thank you for providing me this time because I believe that H.R. 5490 represents a large and necessary step we must take if we are to maintain the progress achieved over the last 11 years in ridding our educational institutions of discrimination.

I am hopeful that together with the Judiciary Committee and the Education and Labor Committee we can work closely together to produce a bill which we can enact this year.

Thank you.

Mr. SIMON. If there are no further opening statements by members of the two committees, we will call on our first two witnesses, our esteemed colleagues, Leon Panetta and Olympia Snowe. The two of you will take the witness chairs there. Mr. Panetta.

STATEMENT OF HON. LEON E. PANETTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. PANETTA. Thank you, Mr. Chairman. I appreciate the opportunity to appear before you and I would ask unanimous consent to have my testimony made part of the record.

Mr. SIMON. Without objection.

Mr. PANETTA. And if I could summarize what I think are the key points involved.

I come to you as someone who for the last 20 years has been involved in civil rights in one capacity or another. As a legislative assistant on the Senate side, I helped draft civil rights legislation, landmark civil rights legislation in housing, and in other areas.

As an attorney, I represented minorities, women, in discrimination suits before the district court, Federal District Court, the Supreme Court.

And as Director of the Office for Civil Rights, I was responsible for enforcing the very laws that you are concerned about here, specifically title VI and title IX.

I want to express, as a result of all of them, my concern over the *Grove City* decision and more specifically, my support for H.R. 5490, which I think would restore the law to the condition that was intended.

It is essential for three important reasons: The first is that it is my experience that the promise for equal rights, civil rights, equal justice, means virtually nothing if you don't have strong enforcement. That is the lesson of the history of civil rights.

We have had two tracks to enforce those laws. One has been through the court system and the Justice Department; the other has been through the administrative process and through the departments that have jurisdiction over funding for various programs—a two-pronged attack to try to implement civil rights in this country.

The administrative side consists of title VI, section 504, and title IX. My concern about *Grove City* is obviously whatever is applied to title IX can easily be extended to title VI and to section 504. I think that is the great danger that we are dealing with here.

Anyone who has a rudimentary recollection of what took place after the *Brown* v. *Board of Education* decision understands the importance of administrative enforcement in terms of the termination of Federal funding.

Between 1954 and 1964, there was virtually no implementation of the Supreme Court decision, except in a few court decision. I think about 1 percent of the school districts in the South were desegregated during those 10 years.

Following the enactment of the 1964 Civil Rights Act and more specifically, following the enactment of the Elementary and Secondary Education Act and the other Federal programs that inserted funding into school districts, within 4 years we had almost 25 percent desegregation in southern school districts largely through the administrative tool of title VI, holding up the threat of termination of Federal funding.

Grove City would certainly weaken that aspect of enforcement and, therefore, it would undermine the promise of equal rights.

Second, strong enforcement demands that there be clarity in the law, not only a commitment to the law, but certainly clarity in the law. It is tough enough to enforce civil rights laws under the best of circumstances. Let me tell you as one who has been involved with that issue, it is tough enough to do under the best of circumstances. It is always an emotional issue; it is always a controversial issue; it always involves a very tough laying out of the evidence to make the case; it involves solutions that are never easy. Add to that the problem of local politics, which often gets involved in cases at the local level, whether it is superintendents, or heads of college institutions, or governors.

I can recall going to Louisiana once and going through a kangaroo court because we were trying to desegregate the colleges and universities in Louisiana.

All of those factors make it tough enough to deal with the enforcement of civil rights laws. If you add to that confusion in the law, it becomes virtually impossible.

My concern is that *Grove City* has virtually confused the law with regards to administrative enforcement in this area.

You need to have the leverage of termination of all Federal funds if these laws are going to mean anything in terms of enforcement.

The last point I would make is this: What is being proposed in H.R. 5490 is right; it is right morally, it is right legally. Morally, we have no business providing taxpayer funds, Federal funds, to any institution, school district, what have you, that discriminates.

That has been our commitment as a country and we have tried to fulfill that commitment by saying we are not going to subsidize discrimination in any fashion.

If you have discrimination in one aspect of an institution's operation, there is just no question that it infects the operations of the entire institution.

This is something we have been over in the past. I can remember school district cases when I was Director of the Office for Civil Rights, the administration at that time tried to interpret the cutoff of funds as applying to only program in a school district. That went to the fifth circuit court, at that time, in *Board of Public Education* v. *Finch*, said that that one program infects the entire operation of the district. Because if the board, if the superintendent, if an administrator is aware of discrimination in one aspect, how can it not impact in terms of other programs in that area?

So I think the infection doctrine that has been established by the courts applies here. You can't have discrimination in simply one aspect and hope that somehow it doesn't impact on other areas.

Second, it is virtually impossible to trace funds. If you are going to distinguish between what funds go to this particular program, or what funds go to that particular program, it is almost impossible, because most of these funds usually go in a general pot and it is very difficult to trace them to specific aspects of programs that are put into place. So for that reason, once you have established discrimination it would be almost impossible, then, to try to trace the funds so that you could terminate those specific funds.

Lastly, this is not arbitrary. Believe me, anybody that has been involved in the administrative process knows that those who are accused of discrimination are offered full due process. Under the administrative hearing rights that they have, they go through a full administrative hearing in this case. They can even take the case to court and have the courts review that decision, if necessary. They are entitled to full due process. There is no determination until the government has been forced to make a clear-cut case for discrimination.

So it is not as if we are trying to bypass anything. The responsibility of the government is to make a case that in fact discrimination exists.

I know there is a great deal of rhetoric about concern and commitment to civil rights and equal rights. But, very frankly, I don't think it means very much unless we are going to accompany that commitment with very strong enforcement. For that reason, I urge the enactment of this legislation.

Mr. SIMON. We thank you very much.

[Prepared statement of Congressman Panetta follows:]

PREPARED STATEMENT OF HON. LEON E. PANETTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman and members of the Committees, I am very glad to have the opportunity to testify today in support of legislation to address what I believe to be one of the most serious threats to civil rights enforcement we have faced in many years.

Like many of you here today, I was shocked and alarmed at the Supreme Court's recent decision in the case of *Grove City College* v. *Bell*. My service as head of the Office of Civil Rights at the Department of Health, Education and Welfare—the official responsible for enforcing Title VI of the Civil Rights Act of 1964 particularly as it applied to school desegregation—taught me how strong a weapon federal assistance and the threat of termination of such assistance can be in the fight against discrimination. I believe my experience qualifies me to state that the narrow interpretation of Title IX favored by the Supreme Court in the *Grove City* case has the potential for undermining 20 years of progress in the struggle not only to end federal subsidization of discrimination, but to eliminate such discrimination wherever it exists.

The operative language of Title IX, prohibiting sex discrimination in any education "program or activity receiving Federal financial assistance," was patterned directly after Title VI, as was the wording of Section 504 of the 1973 Rehabilitation Act and the Age Discrimination Act of 1975. In all these instances, Congress relied on the model established not only by the statutory language of the 1964 Act, but also by the regulations and court decisions which we used to enforce Title VI throughout the period of the late 1960's and early 1970's. Those regulations were incontrovertibly clear in their broad application of Title VI not only to particular programs, but to all practices and programs in an institution seeking federal aid. That interpretation was reinforced by the courts, particularly by the "infection" doctrine set forth by the Fifth Circuit Court in this ruling in *Board of Public Instruction* v. *Finch*, handed down in 1969 during my tenure at HEW. In that case, the court held that a decision to terminate federal funds was proper "if they are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment."

The reality is that the threat of a funding cutoff—not only to the specific program which receives federal aid, but to all discriminatory programs—is the only real enforcement tool the federal government has. Our experience with Title VI and school desegregation provides the proof. During the ten years of court battles between the Supreme Couret's *Brown* v. *Board of Education* decision and passage of the 1964 Civil Rights Act, the number of black children in the Deep South attending schools with a majority of white students grew to only 1%. As HEW began to enforce the Act, using the threat of a cutoff of funds, the percentages soared by comparison, to 2.25% in the 1964-65 school year, 6% the following year, 12.5% the year after, and then 13.9%. By late 1968, the number had reached 20%.

The aim of Title VI was not to terminate federal aid to school districts—many of them the poorest in the country—but to apply the threat of termination to induce those districts to comply with the law. The long, slow nature of the Title VI procedure was designed to get defiant school districts to comply, to reinforce superintendents who wished to desegregate but wanted a crutch like the Federal law to lean on before a hostile community—not to deprive a district of funds. But in its detail and inexorability, it would lead to a fund cutoff if that was what the district deserved. If the law is not enforced, the law is worthless.

The evidence is clear that without the leverage of funding termination, Title VI—and the other civil rights statutes based on Title VI—are meaningless. In this light, the potential of the *Grove City* decision for crippling federal civil rights enforcement is indeed frightening. It is possible under the ruling for women to be denied participation in athletic programs or math or science programs, to be denied use of certain facilities, or even to be denied admission to an educational institution, as long as those particular programs are not receiving federal aid. A case against the University of Maryland involving discrimination against female athletes has already been dropped. The Department of Education has announced its intention to rewrite its Title IX regulations, and Assistant Attorney General Reynolds has already stated his belief that the *Grove City* ruling can be extended to Title VI and Section 504 as well.

In view of these implications, Congress must act immediately to reaffirm our commitment to strict enforcement of the law and to put teeth back into the federal civil rights statutes. The bill you are considering today, H.R. 5490, would accomplish that goal by replacing the phrase "program or activity" with "recipient" and specifying a broad definition of "receipt." At the same time, the bill maintains the original intent of the program-specific language, which was to target the threat of a cutoff at only those funds which actually support discrimination.

This bill does not represent a radical change in civil rights enforcement, but it does ensure that that enforcement will be effective. If we do not correct the *Grove City* decision then we have effectively eliminated Title IX and by extension, those statutes which prohibit discrimination on the bais of race, color, national origin, handicap or disability, and age as well. Justice Brennan, in his dissent in the *Grove City* case, stated his belief that in its ruling, the Court "completely disregards the broad remedial purposes of Title IX that consistently have controlled our prior interpretations of this civil rights statute." I believe H.R. 5490 restores that purpose, and I urge your immediate and positive action.

Mr. SIMON. Unless there is objection, we will hear from our colleague Olympia Snowe and then have questions for the two of you.

STATEMENT OF HON. OLYMPIA J. SNOWE A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MAINE

Ms. Snowe. Thank you, Mr. Chairman.

I am here today in my capacity as Republican cochair of the Congressional Caucus for Women's Issues, and I am pleased to express my enthusiastic support for the Civil Rights Act of 1984. Educational equity, particularly title IX, has long been a priority issue for the congressional caucus.

I am also pleased to have worked along with the Black and Hispanic Caucuses to work for prompt passage of this legislation as well.

On February 28, 1984, the Supreme Court broke with logic and past history as well as congressional intent. As we all know, it decided that within a college only those specific programs and activities which actually receive Federal funds would be covered by title IX. In other words, only within a given specific educational institution would those programs receiving Federal funds would be barred from discriminating on the basis of sex.

The Civil Rights Act of 1984 is neither a groundbreaking piece of legislation nor revolutionary in its idea of civil rights. But this is not to say that it is not a very critically important legislation to American women, it certainly is.

This legislation is intended to return to American women the legal rights and revenues that they had prior to the Supreme Court decision.

This bill would also restore, I think, a broader scope and coverage to title IX which marked its enforcement during Republican and Democratic administrations before the *Grove City College* case.

Before title IX was enacted, it was legal as well as common, to exclude women from professional schools. They were barred from access to vocational educational programs, and they were denied opportunities for athletic competition and scholarships.

Since 1972, title IX really has been the primary legal preventive against such discrimination and provided dramatic opportunities for women and girls to pursue a quality education.

We can see that as evidenced by the increased enrollments in our Nation's professional schools. For example, in our medical schools, women's enrollments have increased from 11 percent to 29 percent. In dental schools, enrollments have risen from 2 percent to 20 percent, and in our law schools, from 11 to 39 percent.

Federal enforcement of this statute has been spotty and erratic at best. Not one school, university, or college has ever lost Federal funding due to their failure to comply. And yet, due to voluntary compliance by educational institutions, by monitoring efforts of individuals and organizations, a greater number of women in this country have had the opportunity for educational pursuit.

The Supreme Court's decision, in my opinion, is certainly a giant step backwards for the progress that women have achieved in achieving equal educational opportunities.

Shortly after the Supreme Court made its decision, several university and college officials said that this decision by the Supreme Court would have no effect on the practices of universities and colleges because title IX was so firmly entrenched. Yet, a few days later, the Department of Education dropped a pending suit against the University of Maryland regarding their failure to provide adequate athletic opportunities for women.

Subsequent to that action, the Department of Education also dropped a pending suit against the Pennsylvania State University.

In the wake of *Grove City* there is no longer any Federal law which comprehensively prohibits sex discrimination in education as all of these actions would demonstration. And although *Grove City* is specifically related to title IX, it has, I think, much more far-reaching ramifications than that.

If title IX remains programs specific, then there are three other major civil rights statutes, as we all know, that are similarly worded and, therefore, would suffer a similar fate. We have section 504 of the Rehabilitation Act, we have the Age Discrimination Act, and title IX, all of which have been modeled after the guarantees of title VI of the Civil Rights Act. So collectively, these statutes insure that discrimination by beneficiaries of Federal aid would be prohibited.

Recently, the Assistant Attorney General for Civil Rights and the Justice Department indicated that the *Grove City* findings would apply to other civil rights laws as well.

So I think the legislation that we have here today and before these committees are most appropriate in making the kind of changes that are necessary in our statutes to insure that congressional intent is carried through.

As we all know, the changes in the legislation would provide eliminating the language of "program and activity" more broadly defining "recipient" so that an entire institution, that is, the recipient, would be barred from discriminating when any of its parts received Federal funding.

Mr. Chairman and members of the committee, I don't have to tell you how time is of the essence with respect to the passage of this legislation. We know that there are few days remaining in this legislative session.

Fortunately, in the Senate there is a broad-base bipartisan group of 62 Senators who have cosponsored similar legislation. I think that if the overwhelming passage of House Resolution 190 last November is any indication, the House of Representatives will follow suit when they have that opportunity.

So I would hope that the committees would consider this legislation with dispatch and without amendment.

If the Supreme Court did not know what Congress intended when we originally passed these four major civil rights statutes, we should make it perfectly clear in 1984 that discrimination on the basis of race and sex, and national origin, or age or disability, will be prohibited. And that any recipient of Federal assistance will also understand if they do discriminate, that there is no question that it is against the law.

So, again, Mr. Chairman and members of the committee, I appreciate this time to be able to testify here this morning. I would be glad to answer any questions.

[Prepared statement of Congresswoman Snowe follows:]

Prepared Statement of Hon. Olympia Snowe, a Representative in Congress From the State of Maine

I am here today as Co-Chair of the Congressional Caucus for Women's Issues to express my enthusiastic support for the Civil Rights Act of 1984. Educational Equity, particularly Title IX, has long been a priority issue for the Caucus. I am pleased to be here today with the Black and Hispanic Caucus to work for passage of this legislation.

On February 28, 1984, the Supreme Court broke with logic, past history, and Congressional intent. It decided that within a college only those specific programs or activities actually receiving federal dollars are covered by Title IX. In other words, within a given educational institution, only those programs or activities which directly receive federal funds are barred from discriminating on the basis of sex.

The Civil Rights Act of 1984 is neither a ground-breaking piece of legislation nor a revolutionary idea in civil rights. This is not to say, however, that this legislation is not of critical importance to American women . . . It is. This Bill is needed to return to American women the legal rights and remedies they had prior to the court's decision, and it will restore the broad scope of coverage to Title IX which marked its enforcement during both Republican and Democratic administrations prior to the *Grove City* decision.

Before Title IX was enacted, it was both legal and common for women to be excluded from professional schools, barred from access to vocational education programs, and denied opportunities for athletic competition and scholarships.

Since 1972, Title IX has been the primary legal preventive against such discrimination, and it has dramatically expanded the opportunities for women and girls to pursue a quality education. Bewteen 1972 and 1982, Title IX helped open the floodgates into our nation's professional schools. Women's enrollment in medical schools increased from 11% to 29%, in dental schools from 2% to 20%, and in law schools from 10% to 36%.

Federal enforcement of the statute has been spotty at best. Not one school, college or university has lost federal funding due to failure to comply. Yet, due to voluntary compliance of educational institutions and monitoring efforts of individuals and organizations, greater numbers of women have been able to take advantage of educational opportunities.

The Supreme Court's decision is a giant step backward for the progress women have made in achieving equal educational opportunity.

Shortly after the decision was handed down, several university officials were quoted as saying this decision would have no impact on the practices of colleges and universites since Title IX was now so firmly entrenched. Only a few days later, citing the Court's decision, the Department of Education dropped a new finding of descrimination against the University of Maryland for failing to provide women students with adequate athletic opportunities. The Department subsequently dropped a Penn State case in which a decision was pending.

In the wake of *Grove City,* there is no longer any federal law which comprehensively prohibits sex discrimination in education, as these actions clearly demonstrate.

Although the *Grove City* case is about Title IX, its ramifications are much more far-reaching. If Title IX remains program-specific, three other major civil rights statutes, similarly worded, are likely to suffer the same fate. Section 504 of the Rehabilitation Act, the Age Discrimination Act, and Title IX were all modeled on the guarantees found in Title VI of the Civil Rights Act. Together these statutes ensure that discrimination by beneficiaries of federal financial assistance is prohibited. Indeed, the Assistant Attorney General for Civil Rights has confirmed that the *Grove City* holding will be applied to other civil rights laws.

The Legislation we are discussing today makes necessary changes in each statute that will ensure their ability to carry out the original intent of Congress. It clarifies the scope of coverage by eliminating the "program or activity" language which was so narrowly interpreted by the Supreme Court, and by defining the term "recipient" in a broad manner. The effect of this change is that an entire institution—that is, the "recipient"—would be barred from discriminating when any of its parts receives federal funds.

In the enforcement section of each law, the term "program or activity" is again deleted and replaced by the term "recipient." This will ensure that when an institution discriminates, the federal government has the authority to terminate its federal funding.

Mr. Chairman, I don't need to tell you that time is of the essence for passage of this measure. We are all aware of the dwinding number of days remaining in this session of Congress. In the Senate, a broad-based, bipartisan group of 62 Senators is cosponsoring the bill. If the overwhelming passage of H. Res. 190 last November is any indication, I am confident that my colleagues in the House will follow suit.

Mr. Chairman, on behalf of the Congressional Caucus on Women's Issues, I urge the Congress to move quickly to pass the Civil Rights Act of 1984 without amendment.

If we did not make clear to the Supreme Court what we meant when these four critical civil rights statutes were originally passed, we will make it perfectly clear in 1984. Discrimination, based on race, sex, national origin, age, or disability, has no place in our society, and where it is practiced by recipients of federal funds, it is clearly against the law.

Mr. SIMON. We thank you both.

If the Chair could just take a moment to comment that you are both correct in saying that we have moved sometimes with agonizing slowness, as you point out, Mr. Panetta, since the 1954 decision.

In the section 504 area, for example, progress is just very, very meager, and to take away whatever legal sanction might be there, which the *Grove City* decision comes close to doing, would be a great disservice to the country. I appreciate the testimony that both of you have given.

Mr. Jeffords?

Mr. JEFFORDS. Thank you, Mr. Chairman.

First of all, although I was here at 11 o'clock, the hearing didn't start, and I would like to have my statement put in the record, if I might.

Mr. SIMON. Those words of wisdom will be entered in the record.

[Prepared statement of Congressman Jeffords follows:]

PREPARED STATEMENT OF HON. JAMES M. JEFFORDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VERMONT

Mr. Chairman, I am pleased to be a part of these important hearings on H.R. 5490, the Civil Rights Act of 1984. I think my colleagues would agree that this is probably the most important civil rights legislation to come before this Congress.

I applaud the chief sponsors for their efforts on this legislation, and as a cosponsor of this legislation, I am convinced that it is vital for the Congress and the country that it be enacted,

As previous speakers have already noted, this legislation is designed to clarify congressional intent with respect to Title IX of the Education Amendments and three other civil rights statutes containing similar language.

In my opinion, the Supreme Court's decision in the case of *Grove City College* v. *Bell* misread this intent. By limiting the coverage of Title IX to only those programs and activities directly receiving Federal funds, the Supreme Court's decision gives rise to an unintended and untenable situation. The Court has said, in effect, that a recipient of Federal Aid may discriminate on the basis of sex—and by inference race, age or handicap—without jeopardizing its funding if the discrimination is restricted to those programs or activities that do not directly receive Federal Assistance.

As the legislative history of Title IX indicates, as the House overwhelmingly reaffirmed last year, and as the broad support for this legislation further underscores, Congress did not and does not intend for the language of these statutes to be construed narrowly. Rather, the Federal Government must demand as a condition of receipt of Federal Funds that civil rights law be observed, and that equality of opportunity be preserved.

This is not a partisan issue, and we must not allow it to become one. I am pleased that the support for this legislation has crossed party lines. I hope that these hearings will serve as a catalyst for even broader support, both with this Congress and from the Administration as well.

I thank you, Mr. Chairman.

Mr. JEFFORDS. I want to commend both my friends. I enjoy working with both. And as cosponsor of this legislation, I don't need to say anything more other than the fact that I certainly agree with what they have said, and hope that these committees will take speedy action.

Mr. **Simon**. Mrs. Schroeder.

Mrs. **Schroeder**. I have no questions, and I don't think there could be two finer people in the Congress to lead this off.

Mr. **Simon**. Mr. Sensenbrenner.

Mr. **Sensenbrenner**. Mr. Chairman, I have a question for Mr. Panetta who is the ex-enforcer of the crowd here.

I am certain that you heard my opening statement where I expressed concern about the fact that title IX sanctions and enforcement might be imposed upon a private school merely for inviting a police officer whose department was a recipient of LEAA funds when we still had that program, or a Member of Congress to come in and speak, are matters of concern.

Is it your intent in authoring this bill to bring the private schools under title IX enforcement merely for that extremely remote connection of Federal funds?

Mr. **Panetta**. No, I would view the main intent of this legislation to restore the basic interpretation of the laws that existed prior to *Grove City* and not to expand it beyond that.

Mr. **Sensenbrenner**. Yes, I agree with your analysis. But I do think that it is important that the record be clear that the Federal string is not that tenuous in order to expedite the passage of this legislation, because I am afraid that if some would interpret that that tenuous a Federal string could kick in the title IX sanctions, we would be in for a lot of trouble.

So I thank the gentleman from California, and I yield back the balance of my time.

Mr. **Simon**. The chairman of the House Education and Labor Committee is here. He should be presiding but he has declined to do so.

Mr. Chairman, do you have any statement or questions?

Chairman **Perkins**. Yes; I have a statement at this time.

The Committee on Education and Labor is pleased to join in these joint hearings with the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary.

The focus of these hearings is on H.R. 5490 introduced by Congressman Paul Simon and many other Members of the House.

The purpose of the legislation, as I understand, is to respond to the Supreme Court's recent decision in the *Grove City* case.

In that decision the Court took an extremely narrow view of the applicability of title IX of the Education Amendments of 1972 which bars discrimination on the basis of sex in federally assisted programs.

The Court said that title IX would only result in the cutoff of funds for the unit of the educational institution directly receiving the Federal assistance and not for the entire educational institution.

Title IX is modeled on title VI of the Civil Rights Act barring race discrimination as is the Age Discrimination Act and section 504 of the Rehabilitation Act which bars discrimination against the handicapped.

We must, therefore, amend all of these laws in order to clarify that the penalty for discrimination is a cutoff of funds for the entire educational institution and not just for a part of that institution directly receiving Federal aid.

We should pass the legislation if the Federal statutes barring discrimination are to be effective. Otherwise, we will have broad national goals barring discrimination and no real means to implement those goals.

I hope that both our committees will take prompt action on this legislation.

[Opening statement of Chairman Perkins follows:]

OPENING STATEMENT OF HON. CARL D. PERKINS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY AND CHAIRMAN, COMMITTEE ON EDUCATION AND LABOR

The Committee on Education and Labor is pleased to join in these joint hearings with the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary. The focus of these hearings is on H.R. 5490 introduced by Congressman Paul Simon and many other members of the House.

The purpose of this legislation is to respond to the Supreme Court's recent decision in the *Grove City* case. In that decision the court took an extremely narrow view of the applicability of Title IX of the Education Amendments of 1972 which bars discrimination on the basis of sex in federally-assisted programs. The court said that Title IX would only cover the unit of the educational institution directly receiving the Federal assistance and not the entire educational institution.

Title IX is modeled on Title VI of the Civil Rights Act barring race discrimination as is the Age Discrimination Act and Section 504 which bars discrimination against the handicapped. We must, therefore, amend all of these laws in order to clarify that the entire educational institution is covered and not just the part of that institution directly receiving Federal aid.

We must pass this legislation if the Federal statutes barring discrimination are to be effective. Otherwise, we will have broad national goals barring discrimination and no real means to implement those goals. I hope that both our Committees will take prompt action on this legislation.

Mr. **SIMON**. Mr. DeWine.

[No response.]

Mr. **SIMON**. Mr. Chandler.

Mr. **CHANDLER**. I have no questions.

Mr. **SIMON**. Mr. Hayes.

Mr. **HAYES**. Thank you, Mr. Chairman. I have just one comment that may wind up into a question too. I want to support the position of both of the witnesses. I think it has been excellent testimony and I shall scrutinize your written testimony that you put in the record.

But to Congresswoman Snowe, you made a statement, if I followed you correctly, that you didn't know whether or not the Supreme Court really understood the impact of the decision that they made. I find it hard to think that these gentlemen and one lady did not realize the impact of the decision they were making, not only on title IX but the other civil rights statute that will affect it. I think you were making that kind of statement and were being very kind to them because I think they consciously knew what they were doing.

Ms. **SNOWE**. I thank the gentleman for his statement. I didn't mean to be too kind because I obviously don't agree with the Supreme Court decision. Also in concert with the decision they rendered on title IX, in the same breath they rendered another decision that was totally inconsistent with the decision they rendered on title IX in the same day, so it is hard to justify and to explain.

Mr. **Hayes**. Thank you, Mr. Chairman.

Mr. **Simon**. Mr. Petri.

Mr. **Petri**. I have no questions.

Mr. **Simon**. Mr. Penny.

Mr. **Penny**. No, Mr. Chairman.

Mr. **Simon**. Mr. Gunderson.

Mr. **Gunderson**. I have no questions.

Mr. **Simon**. We thank both of the witnesses very much for your statements and for your leadership.

Ms. **Snowe**. Thank you.

[Prepared statements of Congressmen Fish and Garcia, and Congresswoman Schneider follow:]

PREPARED STATEMENT OF HON. HAMILTON FISH, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, members of the Civil Rights Subcommittee and the Education and Labor Committee, I welcome this opportunity to appear before you today to express my support for H.R. 5490, the Civil Rights Act of 1984. As one of the prime sponsors of the legislation, I am grateful that you are holding these joint hearings in order to expedite consideration of H.R. 5490.

This is the most important civil rights legislation Congress will consider this year. It is critical that we act promptly to insure its passage. I have worked closely with a unified coalition of women's, handicapped, minority, and elderly groups to write a strong bill that will restore the rights lost by the *Grove City* decision.

You are considering today a bill which expresses the law on title IX and other vital civil rights statues as we in Congress always thought they applied. Prior to the *Grove City* decision, it was believed that coverage of title IX was broad enough to prohibit the entire institution from discriminating, while enforcement for purposes of fund cut-off was limited to the specific program or activity found to be guilty of discrimination. But the Supreme Court read the statute narrowly, finding that only the program or activity would be covered. Therefore, the rest of the institution could discriminate without losing Federal funds and without being subject to action by the Justice Department.

Clearly, this is not what Congress intended, as just two months earlier, a resolution was passed with over 400 votes expressing the sense of the Congress that title IX should not be altered in any manner which would decrease the comprehensive coverage of the statute. The legislation before you would write into law the interpretation of title IX which we voted for in November.

The effect of title IX has been to greatly increase educational opportunity for women in this country. Enrollment in professional schools is up substantially since 1972—over 100 percent in dental schools, 120 percent in veterinary schools, and 337 percent in law schools. Without the incentive and the force of law of title IX, there is growing concern that these advances will not be continued in the future.

Title IX is expressly modeled after title VI of the Civil Rights Act of 1964, and similar language regarding "program or activity" appears in section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. The narrow definition of such language under *Grove City* could be applied to these other critical civil rights statutes, opening up the opportuntity for discrimination against minority, handicapped, and elderly individuals.

H.R. 5490 does nothing more than bring the law back to its original purpose, guaranteeing the full protection of the constitution Congress sought to accomplish by the original language of title VI. Recipients of Federal funds will be covered in their entirety, yet will not have every source of funding cut off as a remedy should the discrimination occur in only part of an institution. The four statutes will operate as they had for many years prior to the *Grove City* decision.

I know that the two committees holding this hearing today will cooperative fully in expediting consideration of H.R. 5490. I am hopeful we can get this legislation approved by both committees and on the floor of the House as soon as possible. Nothing less than the basic rights of many Americans to live free from discrimination and to achieve equal opportunity are at stake. Our prompt action is required.

Thank you.

PREPARED STATEMENT OF HON. ROBERT GARCIA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Honorable Chairmen, I appreciate this opportunity to testify before you and present my views on HR 5490. We are seeking a solution today for probably the most important civil rights issue of this decade: the right of an individual to attend the college of his or her choice without regard to race, gender, age or physical ability. We do this in part by broadening the definition of federal financial assistance to include an entire institution so if any part of the institution discriminates, the whole institution could face fund termination. My colleagues, discrimination is evil in any form, but it is made even worse with regard to educational access if used to make a difference in treatment on any basis other than individual merit. And access to education is what we are talking about in this legislation: That is, whether all people will have equal opportunity to attend the educational institution of their choice. Like the United Negro Fund advertisement says, "A mind is a terrible thing to waste". Think of it, disallowing education simply because a student is denied access to the college of his or her choice. We have not tolerated this in the past and we will not tolerate it in the future.

Messrs. Chairmen, I represent a "minority" district. That is, the population of my district is 42% black and 53% Hispanic. So I know quite well the problems of access and choice minorities face in obtaining an adequate education. The statistics are staggering for minorities nationally. 50% of blacks and 40% of Hispanics are dependent on student financial assistance. But access to education is not just a minority problem. It is a middle class problem. 50.8% of all students are dependent on government assistance for education. The educational opportunities these figures represent are overwhelming and we should not be in the business of contributing to the loss of educational opportunity for even one individual. This legislation is a positive step in that direction.

However, I am concerned that potentially at least, this legislation could be contributing to the very problem of access and choice I mentioned earlier. Let me explain. I am aware of two colleges since the Supreme Court's decision in *Grove City* that have decided not to accept student financial assistance. Now admittedly two colleges do not make a trend. But what if this is a trend? It could mean that many students who wish to attend these colleges or similar colleges will be unable to use their federal assistance at these institutions. Consequently, we might be contributing to the loss of educational opportunity for an unknown number of students. I respectfully urge the committees to carefully consider this situation and a possible mechanism to deal with this potential problem.

I have given some thought to this problem and would like to share with you a couple of possible solutions. One is a sunset provision attached to the legislation. It would be triggered by attainment of a certain national threshold, of say 5,000 students, who were unable to use their federal aid at the college of their choice. So, if 5,000 students nationally were unable to attend the college of their choice, the legislation would be sent back to Congress to be redrafted or amended.

The second mechanism I have thought of would allow colleges on a case by case basis, (if there was no history of discrimination and no discrimination existed at the present), to prove that a certain number of students would have gone to that particular college had they been able to use their federal assistance at that college. If the numbers proved valid, and no discrimination existed, then the college would be exempted from the requirement that student financial assistance be considered direct federal assistance. If the college did discriminate in the future, then its exemption would be invalidated. My colleagues, we are dealing with a tricky situation. On the one hand we are trying to provide a mechanism to prevent discrimination. On the other hand we don't want this same mechanism to be creating discrimination either. I think my proposals offer the best of both worlds. By allowing for a triggering device to activate these proposals, we allow the legislation to serve its intended purpose, but if the worst scenario occurs, then a correcting vehicle is available. So nothing happens unless trouble develops.

Messrs. Chairmen, education is the most precious tool the lower and middle classes have of closing the gap between the rich and the poor. We should do everything we can to assist in shrinking that gap. What we are talking about in a sense are dropouts. That is, kids who may not be able to attend the college of their choice. In the worst case scenario, these dropouts would indicate an inadequacy of the educational system and not of the human individual. We should be doing everything we can to maximize human potential. This legislation, with a few minor adjustments, will assist in these efforts.

PREPARED STATEMENT OF HON. CLAUDINE SCHNEIDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF RHODE ISLAND

Mr. Chairmen: I am grateful for the opportunity to testify today on this first day of hearings devoted to H.R. 5490—legislation designed to clarify the nation's most important civil rights statutes. I commend my distinguished colleagues, Chairmen Edwards and Simon, for expeditiously acting on this legislation and for their fine work and determination in striving for the goal of eradicating discrimination in our society.

As most of you here today are aware, I have been working on behalf of a strong Title IX since coming to Congress in 1980. When during my first term in office Senator Hatch introduced legislation designed to narrow that scope of Title IX law, I recognized that the intended effect of this measure would be detrimental not only to Title IX statute but to all civil rights laws. I believed then and I continue to belive now that a restrictive Title IX interpretation goes against the very intent of Congress and takes the nation back in time in its commitment to promoting the civil rights of American citizens.

From the day that I introduced a resolution in response to the Hatch legislation, I have put into action, with the assistance of many concerned colleagues, my agenda to ensure that Title IX remain strong and comprehensive. In November of last year I am proud that my resolution passed the House by a vote of 414 to 8, confirming that Congress does support a comprehensive interpretation of Title IX. Moreover, I received a fine show of bipartisan support from 75 Senators and Members of Congress when I submitted my amicus brief in the *Grove City College* v. *Bell* case.

Mr. Chairmen, following the Grove City decision, I believed immediate action was necessary to rectify the intended scope of Title IX. Within two days of the Court's ruling, I introduced my own legislation, H.R. 5011. As the only federal statute prohibiting sex discrimination in education, Title IX represents the cornerstone of progress for women both in academia and in the workplace. It is difficult for many of us to recall or for young people to imagine, but prior to the enactment of Title IX, blatant discriminatory policies were commonplace in American schools and universities. In the sixties and early seventies, many postsecondary institutions set higher admission standards for the women students than for the men. Out of 188,900 freshmen entering colleges and universities in 1972, 44% of the women had B+ averages or better compared with only 29% of the men. Also, prior to Title IX's enactment, financial aid was awarded differently depending on sex. For instance, in 1967 the average award of financial aid for men was $1,001 while for women the average award was $786.

The comprehensive enforcement of Title IX did make a difference in eliminating such overt examples of sex discrimination in education. When the Justices ruled to limit Title IX's scope in *Grove City,* I, for one, could not sit idly by and allow the teeth to be taken from the vitally important statute. Already, in the two months since the Court handed down its decision, at least four universities have been relieved from discrimination suits in direct response to the *Grove City* ruling. Despite charges of discrimination at the Pennsylvania State University, the University of Maryland, the University of Alaska, and the University of South Idaho, the Office of Civil Rights at the Department of Education will not pursue further investigation into the cases since the discrimination did not occur where federal funds were "pinpointed."

While, as you can see, my overriding concern over the years has been the protection of Title IX, the Grove City decision brought home the very real possibility that the federal statutes which have prohibited discrimination against the elderly, the disabled and minority populations now were in jeopardy of being weakened and interpreted in a fashion unintended by Congress. Assistant Attorney General Bradford Reynolds himself stated after the decision that in his opinion the ruling would apply to other civil rights statutes.

As I see it, Congress can not now renege on its commitment to ensure fairness to American women, elderly, disabled and minority citizens. We must not allow one dime of federal money to be used toward the subsidization of discriminatory programs of practices. Title IX of the Education Amendments of 1972, Section 504 of the 1973 Rehabilitation Act, Title VI of the Civil Rights Act and the 1975 Age Discrimination Act have gone a long way towards prohibiting discrimination. Our nation is a better place as a result of these antidiscrimination statutes. And make no mistake about it—without the hard work and dedication of both Republican and Democratic Administrations, those civil rights statutes would not nearly be so strong as they are today. I am firmly committed to continuing the practice of strong enforcement of the civil rights laws of the land and I have been working with the

Administration to ensure their support as well. I am enclosing for the record a copy of a letter I generated to Chief of Staff James Baker, signed by twenty five prominent Republican Senators and Representatives, in which I urged swift approval of H.R. 5490.

Prompt legislative action is needed to rectify the effects of the Grove City decision. We must embrace a commitment to civil rights that trancends party lines. We must once and for all clarify the government's commitment to these civil rights statutes and ensure the vigorous and enthusiastic enforcement of these laws.

Mr. SIMON. I understand one of our next witnesses is on his way here. If any members have any further comments or discussion until he arrives?

[No response]

Mr. SIMON. We will stand in recess for a moment or two.

[Brief recess]

Mr. SIMON. I think we will enter the statement of the gentleman from California in the record.

[Prepared statement of Congressman Anderson follows:]

PREPARED STATEMENT OF HON. GLENN M. ANDERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, distinguished members of both committees, I first would like to thank you for extending me this opportunity to appear before this joint hearing of the Committee on Education and Labor and the Judiciary Subcommittee on Civil and Constitutional Rights. I am honored to be here today to testify in support of clarifying the intent of Title IX of the Education Amendments of 1972, as well as the anti-discrimination language of some othe important statutes.

Not too long ago, some college and university students from my district used their Spring breaks to come back here and meet with me to discuss the importance of Title IX. They are still in a state of shock, as am I, because of the Supreme Court's holding in *Grove City College* v. *Bell*. The students whom I met with share my belief that Title IX's purview should extend institutionwide. Until the court's ruling in *Grove* we always thought it did.

However, those students who visited me and I also realize that Title IX was fashioned after Title VI of the Civil Rights Act, which prohibits discrimination on the basis of race or national origin. Since the court has held that Title IX is program specific, it is apparent that Title VI would be interpreted similarly. The same can also be said of section 504 of the Rehabilitation Act, which prohibits discrimination against persons with disabilities, and the Age Discrimination Act, which is intended to protect people against policies that discriminate on the basis of age. So it is important that Congress also clarify the intent of these laws.

Before proceeding any further, Mr. Chairman, I would like to say a few laudatory words about two of our colleagues, Representatives Pat Schroeder and Claudine Schneider. For although many of us have stood with them, these two have provided leadership on women's issues in this House which is unsurpassed by the degree of leadership provided by any member on any issue. I am proud to be a co-sponsor both of Representative Schneider's bill, H.R. 5011, and of the legislation introduced by Representative Paul Simon and being considered today, H.R. 5490, which incorporates her bill's Title IX language.

Obviously, I do not agree with the Supreme Court's ruling in *Grove* that Title IX is program specific and therefore only the college's financial aid program must not discriminate on the basis of sex. A Basic Educational Opportunity Grant (BEOG), or any other form of federal student aid, does much more than merely "free up" funds that otherwise would have to be used to support an institution's own financial aid program. Federal student aid also accomplishes far more than just providing an individual the opportunity to matriculate at an institution that he or she otherwise might not be able to attend.

Students who must rely upon federal loans and grants use this assistance primarily to pay tuition costs. Tuition for the most part covers the costs of enrolling in courses offered by the college or university. In other words, tuition fees are used to support a college or university's programs. If no federal financial aid is available for students attending a particular college or university, potentially fewer students will be able to attend that institution. If an institution is particularly dependent upon financial aid to support its programs, as most smaller private colleges and universities are, and that institution's students cannot obtain any from the federal government because the school practices discrimination, then the institution may wither away. Thus the beneficial effects of federal student aid cannot be seen to end at the desk of a college or university's financial aid director.

If Title IX were allowed to remain program specific and enforced in accordance with the Supreme Court's *Grove* ruling, it is entirely conceivable that federal student aid monies will be used to perpetuate institutions of higher learning which openly practice discrimination against women in every program outside of the financial aid program. The same holds true for a program specific application of Title VI of the Civil Rights Act, section 504 of the Rehabilitation Act, and the Age Discrimination Act. Our failure to clarify the intent of these statues would be tantamount to condoning discrimination at colleges and universities benefiting from federal assistance. I hope we will not fail to clarify the intent of these laws during this Congress.

Mr. SIMON. The hearing will stand adjourned.

[Whereupon, at 11:50 a.m., the joint hearing adjourned.]

CIVIL RIGHTS ACT OF 1984

TUESDAY, MAY 15, 1984

House of Representatives,
Committee on Education and Labor, and
Committee on the Judiciary,
Subcommittee on Civil and Constitutional Rights,
Washington, DC.

The joint committees met, pursuant to call, at 9:12 a.m., in room 2175, Rayburn House Office Building, Hon. Carl D. Perkins presiding.

Members present: Representatives Perkins, Edwards, Hawkins, Conyers, Ford, Schroeder, Kildee, Hayes, Burton, Erlenborn, Sensenbrenner, Jeffords, Packard, and McCain.

Staff present: John F. Jennings, majority associate counsel; Electra C. Beahler, Republican counsel for education; William A. Blakey, majority counsel, Subcommittee on Postsecondary Education; Ivy L. Davis, majority assistant counsel, and Philip Kiko, minority associate counsel, Subcommittee on Civil and Constitutional Rights.

Chairman Perkins. Today the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary continue hearings on H.R. 5490. That bill clarifies the coverage of the major Federal antidiscrimination laws in light of the recent Supreme Court decision in *Grove City* v. *Bell*, narrowing the reach of those laws.

We are delighted to welcome you here this morning, Mr. Rodino. There are only very few of us that came to the Congress at the same time in 1949. You may proceed in any manner you prefer. Go right ahead.

STATEMENT OF HON. PETER W. RODINO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY AND CHAIRMAN, HOUSE JUDICIARY COMMITTEE

Mr. Rodino. Thank you very much, Chairman Perkins, and members of the committees who are deliberating on this very important legislation this morning. It is my pleasure to be with you this morning and it is, indeed, a privilege to appear before you. I believe the last time we did appear together, Chairman Perkins, was when I testified before the Education and Labor Committee on the question of Taft-Hartley. That was at the very beginning of our careers.

Chairman Perkins. That was back in 1949.

Mr. Rodino. Correct, 1949.

Thank you very much. I am here today to offer my full support of H.R. 5490, the Civil Rights Act of 1984. In anticipation of swift subcommittee action on this most vital legislation, I have scheduled H.R. 5490 for consideration by the full Committee on the Judiciary next Wednesday, May 23. It is important that the Congress swiftly let the Nation know that we will not countenance turning back the clock on hard-won civil rights protections.

It is most unfortunate and ironic that misunderstandings and misinterpretations compel us to take this action this year—a year in which we celebrate two civil rights milestones: the 30th anniversary of the Supreme Court's decision in *Brown* v. *Board of Education,* and the 20th anniversary of the Civil Rights Act of 1964.

From my experience and my deep personal involvement in the debates and passage of the 1964 act, and the other subsequent legislation that H.R. 5490 will clarify, I know full well what Congress intended with those laws.

Before enactment of title VI of the 1964 Civil Rights Act, Federal funds were used to build or maintain segregated schools, hospitals, airports, agricultural research stations, housing and food surplus programs. The historic purpose of title VI was to put an end to all of that, to put an end to the use of Federal dollars collected from all the people for unequal and separate treatment for some of the people. All subsequent laws designed to prevent discrimination by recipients of Federal dollars on the basis of sex, race, national origin, age or handicap, were patterned after title VI.

Until last year, every administration and every court correctly read congressional intent, that the laws were to be interpreted broadly to cover all of the activities of recipients of taxpayer money.

Last February 28 the Supreme Court, in *Grove City,* changed that when it ruled that title IX of the 1972 education amendments does not apply to all activities of a recipient institution but only to the particular program receiving such Federal moneys. I do not believe that this is what the law says, nor do I believe that it was intended that way. As a matter of fact, I know that it was not what the law intended. If this ruling is not changed, the broad application of this narrow interpretation can undermine enforcement not only of title IX but also of title VI of the 1964 Civil Rights Act, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

H.R. 5490, Mr. Chairman, will make clear once and for all that the ban on discrimination applies to an entire institution if any part of it receives Federal aid. It is imperative that the Congress act quickly to insure that no private or public institution or agency that receives taxpayers' dollars can discriminate on the basis of sex, race, national origin, age, or handicap.

The Supreme Court has ruled that the law does not now say that. I know that is what we intended at the time of enactment. That is what we mean when this body voted 414 to 8 last November to oppose the narrow interpretation of title IX. H.R. 5490 will erase any doubt about our intent.

Some administration officials have been quoted as terming this "radical" legislation that would bring about "sweeping change." This rhetoric has been all too familiar. The same terms were used

2 years ago by the same administration when it fought extension of the Voting Rights Act. As with the Voting Rights Act, there is nothing radical about H.R. 5490. It merely restores the law to where it was before the *Grove City* decision.

This legislation has broad, bipartisan support. H.R. 5490 has more than 135 cosponsors. A similar bill in the Senate has nearly 60 cosponsors from both parties.

Once the two subcommittees have completed action, I pledge, as chairman of the Committee on the Judiciary, that we will move quickly to bring H.R. 5490 to a vote in the House. I am confident, and have no hesitancy in predicting, that it will win overwhelming approval.

Thank you very much, Mr. Chairman.

Chairman **Perkins**. Let me ask you a question. If we don't pass this bill, do you believe that the major Federal antidiscrimination laws will be effective? Don't we need this law to give real meaning to these laws?

Mr. **Rodino**. Mr. Chairman, that is the problem that we're confonted with. Not only do I think that, but I am certain that there will be complete reliance on our failure to do anything and a reliance on that decision which certainly does not carry out the intent of the Congress.

As you and I know, we were both here at that time, along with many others that participated in those monumental decisions to assure that we would no longer suffer from discrimination.

Chairman **Perkins**. Mr. Sensenbrenner.

Mr. **Sensenbrenner**. Thank you, Mr. Chairman.

First of all, I compliment the chairman of the Judiciary Committee on his very excellent and succinct statement. As you may know, I am on the reservation on this bill as a cosponsor of it. However, it disturbs me that there have been some quotes attributed to administration officials that say this bill goes far beyond merely overturning the Supreme Court's holding in the *Grove City College* case. I would like to quote just two of them.

First, OMB Counsel Michael Horowitz is quoted in the May 19, 1984, edition of Human Events on the expansion of Federal power arguing that "Currently, if a Federal agency extends Federal assistance, e.g., to a state university system, its broadest claim would be that the entire university system would be covered by these statutes. Under S. 2568, however, the mere funding of the university would cause every other State agency and activity, police, welfare, roads, and so forth, to be covered. Thus," says Horowitz, "this bill raises serious problems with federalism by extending Federal mandates to the State and local activities and agencies which receive no Federal funds whatsoever."

Also, last week, the Assistant Attorney General for Civil Rights, William Bradford Reynolds, in an interview with the New York Times, said:

> This bill has been portrayed as a minor tinkering, a quick fix to overturn the Grove City decision. But it represents a monumental drastic change in the civil rights enforcement landscape. It rewrites four statutes to the point that the Federal Government would be involved in every facet of State and local activity. Under this bill, if a ma and pa grocery store takes food stamps, it would probably have to put in a ramp to provide access to the handicapped.

Mr. Chairman, do you agree with these two conclusions that have been made in these memorandums and interviews, first by Mr. Horowitz and second by Assistant Attorney General Reynolds?

Mr. RODINO. I believe that what we have to understand is that *Grove City* and the kind of interpretation that was placed on *Grove City* would, in my judgment, impact on whatever agency or institution, private of otherwise, would be receiving those Federal funds. I think that what we need to do, regardless of what others may interpret, is to assure that we write a statute that clearly states again what we intended, and that is to overcome any effort that might be made to discriminate or any discrimination that might take place by any institution, agency or otherwise that is receiving Federal funds, whether in a particularly isolated area or not, providing that institution receives it.

Mr. SENSENBRENNER. I agree with you, that the *Grove City* decision effectively guts title IX, and that it says if a college receives Federal funds to build a chemistry building, then the chemistry department is covered by title IX but nothing else. I think the intent of Congress 10 or 12 years ago when title IX was passed was to bring the entire institution in under the provisions of title IX.

The question is, How long is the string attached? For example, there were some regulations that were proposed that said that if an elementary school that did not receive Federal funds invited in a police officer to talk about bicycle safety, and that police officer's department received LEAA funds, then title IX would apply to the elementary school. I think that was going too far and was certainly an extension of the intent of Congress.

The fear that I have with this piece of legislation is that unless we make a very clear record on how far the string goes of Federal funds in an indirect manner, there will be a lot of unintended expansions of Federal civil rights enforcement as a result of the passage of this bill, and unless we clear these things up, you're going to see a lot of opposition develop to it overnight which I think would be unfortunate.

Mr. RODINO. If the gentleman will permit me to respond, I think the gentleman, who has been a supporter in this area, would certainly want to assure, however, that the clear intent of the Congress back in 1964, when we first started to fight discrimination, and thereon beyond that, was to emphasize that no Federal assistance whatsoever might in any way be utilized, in any way, to practice discrimination of any sort, under any guise. I think if we don't send that clear message, if you're going to begin to try to limit and refine, I think you're going to find that we're going to be back in those days when, by devices, by practices that were very subtle and sophisticated, there was a use of these funds and a practice of discrimination. I'm sure you wouldn't want to get back to that.

Mr. SENSENBRENNER. I certainly don't. But let me just ask you a question that can be answered simply yes or no. Do you agree with William Bradford Reynolds' quote in the New York Times, that under this bill, if a ma and pa grocery store takes food stamps, then it would be required to install a ramp to provide access to the handicapped?

Mr. RODINO. No, I don't believe so.

Mr. SENSENBRENNER. Thank you.

Chairman **Perkins**. Mrs. Schroeder.

Mrs. **Schroeder**. Thank you. I just want to commend my chairman for being here. He has done a wonderful job of moving this bill, and you, too, Mr. Chairman, because this is so long overdue.

I would just like to add to that whole issue about the handicapped. You know, in the Soviet Union right now many of the war veterans from Afghanistan are making a very active plea to their government because they aren't being given wheelchairs, that they're not being allowed accessibility and so forth and so on. One of the great things this country has done is said that we have to go all out for all citizens to make this country accessible to them to make opportunities reachable for them. That's what this bill is all about, and I think both of you have been leaders in that and I compliment for being here and pushing that forward.

Chairman **Perkins**. Mr. Packard.

Mr. **Packard**. Thank you, Mr. Chairman.

I have no questions. I just appreciate the testimony and the statement of Chairman Rodino. Thank you.

Chairman **Perkins**. Mr. Hawkins.

Mr. **Hawkins**. I have no questions. I, too, would like to commend the witness this morning for his excellent testimony and his long devotion to the cause of civil rights. I know that he has been one of the champions that brought us this far and I certainly wish to commend him for his alertness in helping us on this particular issue and continuing with his dedicated service.

Thank you, Mr. Chairman.

Chairman **Perkins**. Mr. Conyers.

Mr. **Conyers**. Thank you, Mr. Chairman.

I think the testimony of Chairman Rodino is very important and I commend him for it. It is obvious to all of us that there is a growing cry for review of civil rights enforcement and it is coming under increasingly critical scrutiny. I am very proud that the chairman of the Judiciary Committee has responded swiftly and that apparently a clear majority of the Members of both Houses and both parties appreciate the grave harm done in *Grove City*. It is in that sense that I commend the chairman for his testimony and his action.

I also want to ask the chairman, if we try to get into every possibile hypothetical case, that to my surprise even the head of the civil rights division can think up, we then move into the role from legislators to interpretors of policy decisions that are cut so finely that it would really be, it seems to be, beyond our desire to attempt to control.

Would the chairman respond to that, please?

Mr. **Rodino**. Of course. I believe that we have got to recognize that what we are doing is writing broad policy guidelines. This is what we intended back when we first began the assault on discrimination in this country, recognizing that we couldn't isolate every particular case, every incident and every specific, and nonetheless leaving that to the courts to make the kind of decision. When the courts, failing to understand what the intent of the Congress might be, for the Congress to do as it is doing now, with its oversight, to be able immediately to respond, I think for that reason these subcommittees should be applauded for immediately moving in this direction. This is why I think we can lose no time in not only clarifying but reemphasizing, because what the gentleman from Michigan has stated so well is what has been taking place over a period of years, a subtle kind of assault which could bring about an erosion, an attempt to challenge what already has been well in place in the history of our country, well accepted, and seeming to turn the clock backward. I believe it is important, whether it happens by an administration or whether it happens by a court, that the Congress speaking for the people and wanting to move forward in this area to eliminate discrimination, subtle or otherwise, should do so. As the gentleman has so well stated, we can't particularize in every isolated, dreamed-up incident in order to spread some hobgoblins of apprehension and concern.

Mr. CONYERS. Well, I hope that the chairman continues to help us assuage the phobias that may be developed about the fear of every potential case. We are not going to write the regs for this. They have already been written. What we are doing is setting the law straight again.

It is sort of shocking that the Supreme Court of the United States has to get this kind of a lesson in 1984. This is not unsettled law. As a matter of fact, they are going against their own decisions. It leaves me slightly amazed that on a matter of this rather elementary nature in civil rights law that we're forced to come back to the ramparts one more time.

Mr. RODINO. I couldn't agree more with the gentleman, because as I recall, back during those days the debate that took place on the floor was replete with instances and experiences of how there was a misuse, how there was an intentional side-tracking of the issue in order to try to avoid doing something about discrimination in every area. I think that we set the law straight once and for all. The debates are clear. I cannot understand how, but they did, and now it is our responsibility to be able to redress that and immediately address it and correct it and to make it clearer once and for all.

I think, too, that this is another lesson that we learn, in that we have got to continue here in the Congress to monitor, to be on our toes, because this subtle kind of attempt to erode has been something—I'm sure others have seen it—that I have seen developing over a period of years and we cannot permit it to occur.

Mr. CONYERS. I thank the chairman because, in a way, maybe I shouldn't be surprised. Maybe he puts this in context with other attempts that are going on on earlier Supreme Court decisions with the civil rights in the United States Maybe this makes a larger pattern or practice. So that instead of being surprised, we will just correct this one and put a thumb in the dike on this one very fast, because it is correctable.

I thank the chairman of the Judiciary Committee and yield back.

Chairman PERKINS. Mr. Hawkins, any further questions?

Mr. HAWKINS. Just one question, if I may.

Mr. Rodino, do you know of any instance under this administration where a civil rights law has been strengthened or that any enforcement procedure has been intensified? Just any single instance.

Mr. RODINO. Mr. Chairman, I regret to say that, as one who has assiduously studied and has had to be aware, because of our responsibility, it seems to me that the converse is true. I regret to say that I think it has been done, it is something that has been done with a conscious awareness, I believe, the challenges that have taken place over a period of time under the guise of questioning have been, in my judgment, really embarrassing because I think we wrote laws which showed progress and I find instead there is this effort instead to try to challenge with one end in mind. And then again turning around and saying, "it was merely a responsibility for us to be able to do this in order to be clear."

Well, the decisions have been clear. The actions of the Congress have been clear. I think the voice of the people has been heard loud and clear across this country, that we want no further discrimination in our laws and especially in the highest body of lawmaking, whether it be in the Supreme Court, whether it be in the legislative body. I think it is something that we ought to put behind us.

But no, I regret to say that in extending the Voting Rights Act, as we saw it, the administration attempted instead to weaken the effort. Whether it was an attempt to create a commission that was independent, that had been independent all along, the Civil Rights Commission, which has had a history of having done a great service for this country, there again has been an attempt again to undermine. Whether it has been in other areas of that sort and all in relation to the question of civil rights or basic rights, those guarantees that affect civil rights, I haven't seen one scintilla of an effort to strengthen.

Mr. HAWKINS. So it would seem that *Grove City* is not just an isolated instance, that it is a pattern that is conscious and deliberate, that it is calculated to undo all the progress that we have made in the field of civil rights and human rights in the last 30 or 40 years. As chairman of a subcommittee dealing with employment, I have noticed the same thing is happening in the equal employment opportunity field, where the office of Federal Contract Compliance has taken 3½ years and has not yet issued its regulations. They are violating basic law. This has extended throughout all of the other areas of civil rights. I have questioned every witness that I could to find one single instance in which the administration has moved to strengthen civil rights. Yet you have the individuals in high office, the head of the civil rights division, leading the attack—actually, on the Supreme Court as well.

It just seems to me that this makes us appear to be hypocritical in the eyes of the world. Just a few months ago I was in Geneva and we were in conference with other parliamentarians, and actually we were embarrassed about some of the things that we are doing around the world, and particularly here at home, in the field of civil rights and the protection of human rights. It just seems to me that it affects not only this program but it affects our civil rights posture. It certainly affects our foreign policy as well.

So it isn't just a little simple case of discrimination in one little institution. It affects all of us and it affects every agency and every phase of our national life.

Mr. RODINO. I couldn't agree with you more, Mr. Chairman. I have always felt very strongly that one of the great strengths of this Nation is at least its professed stand on behalf of human rights. I think the world has looked upon us as such. The Constitution suggests that. But nonetheless, some people employ more rhetoric than action and deeds in carrying that out and implementing it. I think that is where we failed.

But I would hope that again we move quickly in this area and to send a clear signal and a message that we don't intend to permit this to happen. I think it would be a blot on the experience and history of this country to turn the clock back.

Mr. **Hawkins**. Thank you, Mr. Chairman.

Chairman **Perkins**. Mr. Kildee, any questions?

Mr. **Kildee**. No questions, Mr. Chairman.

Chairman **Perkins**. All right.

Thank you very much, Mr. Rodino. You have been very helpful to the joint committees.

Mr. **Rodino**. Thank you very much, Mr. Chairman.

Chairman **Perkins**. Our next witness is former Senator Bayh. Come on around, Senator Bayh. We are glad to welcome you here this morning. Go right ahead and make your statement, and then we'll get to Glenn Anderson next.

Mr. **Bayh**. Mr. Chairman, because of the press of the schedules of the other gentlemen, I would be happy to yield to the decision of the Chair.

Chairman **Perkins**. Glenn, do you need to be present for any markups this morning? If you do, we will take you first.

Mr. **Bayh**. Please, go ahead.

Mr. **Anderson**. Thank you very much, Senator.

Chairman **Perkins**. We're glad to welcome you here, Mr. Anderson. Go right ahead.

STATEMENT OF HON. GLENN M. ANDERSON, A REPRESENTATIVE OF CONGRESS FROM THE STATE OF CALIFORNIA

Mr. **Anderson**. Thank you, Mr. Chairman, and distinguished members of both committees.

I personally would like to thank you for extending me this opportunity to appear before this joint hearing of the Committee on Education and Labor and the Judiciary Subcommittee on Civil and Constitutional Rights. I am honored to be here today to testify in support of clarifying the intent of title IX of the education amendments of 1972, as well as the anti-discrimination language of some other important statutes.

Not too long ago, some college and university students from my district, using their spring break, came back here to meet with me to discuss the importance of title IX. They are still in a state of shock, as am I, because of the Supreme Court's holding in *Grove City College* v. *Bell.* The students whom I met with share my belief that title IX's purview should extend institution-wide. Until the court's ruling in *Grove,* we always thought it did.

However, those students who visited me and I also realize that title IX was fashioned after title VI of the Civil Rights Act, which prohibits discrimination on the basis of race or national origin. Since the Court has held that title IX is program specific, it is apparent that title VI would be interpreted similarly. The same can also be said of section 504 of the Rehabilitation Act, which prohibits discrimination against persons with disabilities, and the Age Discrimination Act, which is intended to protect people against policies that discriminate on the basis of age. So it is important that Congress also clarify the intent of these laws.

Before proceeding any further, Mr. Chairman, I would like to say a few laudatory words about two of our colleagues, Representatives Pat Schroeder and Claudine Schneider. For although many of us have stood with them, these two have provided leadership on women's issues in this House which is unsurpassed by the degree of leadership provided by any members on any issue. I am proud to be a cosponsor of both of Representative Schneider's bill, H.R. 5011, and of the legislation introduced by Representative Paul Simon and being considered here today, H.R. 5490, which incorporates her bill's title IX language.

Obviously, I do not agree with the Supreme Court's ruling in *Grove City,* that title IX is program specific and therefore only the college's financial aid program must not discriminate on the basis of sex. A basic educational opportunity grant, the BEOG, or any other form of Federal student aid, does much more than merely "free up" funds that otherwise would have to be used to support an institution's own financial aid program. Federal student aid also accomplishes far more than just providing an individual the opportunity to matriculate at an institution that he or she otherwise might not be able to attend.

Students who must rely upon Federal loans and grants use this assistance primarily to pay tuition costs. Tuition for the most part covers the costs of enrolling in courses offered by the college or university. In other words, tuition fees are used to support a college or university's programs. If no Federal financial aid is available for students attending a particular college or university, potentially fewer students will be able to attend that institution. If an institution is particularly dependent upon financial aid to support its programs, as most smaller private colleges and universities are, and that institution's students cannot obtain any from the Federal Government because the school practices discrimination, then the institution may wither away. Thus, the beneficial effects of Federal student aid cannot be seen to end at the desk of a college or university's financial aid director.

If title IX were allowed to remain program specific and enforced in accordance with the Supreme Court's *Grove City* ruling, it is entirely conceivable that Federal student aid moneys will be used to perpetuate institutions of higher learning which openly practice discrimination against women in every program outside of the financial aid program.

The same holds true for a program specific application of title VI of the Civil Rights Act, section 504 of the Rehabilitation Act, and the Age Discrimination Act. Our failure to clarify the intent of these statutes would be tantamount to condoning discrimination at colleges and universities benefitting from Federal assistance. I hope we will not fail to clarify the intent of these laws during this Congress.

I thank the gentleman for this opportunity.

Chairman PERKINS. Mr. Hawkins.

Mr. HAWKINS. No questions.

Chairman Perkins. Go ahead, Mr. Jeffords.

Mr. Jeffords. Thank you. I just want to thank you for a very convincing statement in an area that I know we're all deeply concerned about. It will be very helpful to us. Thank you so much.

Mr. Anderson. Thank you.

Chairman Perkins. Thank you, Mr. Anderson, for a well thought out statement.

Mr. Ford, do you want to ask Glenn any questions?

Mr. Ford. No. I just arrived, Mr. Chairman.

Chairman Perkins. Mr. Kildee.

Mr. Kildee. No questions.

Chairman Perkins. Mr. Packard.

Mr. Parkard. No, thank you, Mr. Chairman.

Chairman Perkins. Let me thank you very much, Mr. Anderson.

Mr. Anderson. Thank you, Mr. Chairman.

Chairman Perkins. Come around, Mr. Bayh. Senator, we are delighted to welcome you here this morning. You may proceed in any manner you prefer.

STATEMENT OF HON. BIRCH BAYH, OF BAYH, TABBERT & CAPEHART, WASHINGTON, DC

Mr. Bayh. Mr. Chairman and members of the committee, it is a privilege for me to have the chance to be back once again in front of such an illustrious committee and certainly chaired by one who has done so much for the people of this country over a long, long period of time. I have fond memories of service with all of you gentlemen, and the lady who is not here.

Let me, if I might—I don't like to read testimony, but I picked up the habit when I was in the other body of summarizing remarks that would take 5 or 6 minutes and it usually took 15 minutes to summarize. So perhaps to avoid that, and out of respect for the committee's schedule, we have given some thought to what small contribution I might make to your deliberations and let me perhaps just go quickly through the text and then, of course, yield to any questions that the committee might have.

I do appreciate the opportunity to participate in Congressional deliberations of H.R. 5490. It is a real pleasure for me to help in some small way to advance another civil rights bill. As you know, as a member of the Senate I joined many of the struggles to enact civil rights legislation. Sponsorship of title IX of the Education Amendments of 1972 was one of my proudest legislative accomplishments, in which many others participated. I am delighted to have a chance in some small way to help you and other Members of Congress to give this important piece of legislation renewed life.

There is no doubt in my mind, Mr. Chairman, that the Supreme Court's decision in the *Grove City College* v. *Bell* case leaves title IX and, by implication, the other statutes related to it, weaker than we intended it to be. I understand the somewhat questionable wisdom when one gets to taking issue with another branch of our Government. The Supreme Court certainly is independent and they make their determination, but inasmuch as you are considering new legislation, I think their interpretation of the old legislation is fair game and, in that respect, I am very strongly of the opinion that for those of us who are actively involved in the battle, their interpretation of what we were trying to accomplish is different than I recall it.

However, I don't intend to make that point with you by repeating quotations from the legislative history. Those have been repeated many times in briefs and court decisions on the question of what title IX means and was intended to mean. I simply want to stress that I have no doubt that we intended institution wide coverage for colleges and universities. In order to understand why I say that, perhaps it would be helpful to go back 12 years and recall briefly what we, as legislators, understood about the law at that time.

Remember, first of all, that our central purpose in enacting title IX was to bring the prohibition against discrimination in title VI into the education area with respect to sex discrimination. By then we had 8 years of experience with what title VI really meant. We had a record of enforcement by the Department of Health, Education and Welfare to help us understand what title VI meant. All of the known case law suggested that title VI was a far-reaching statute in terms of scope of coverage.

No enforcement agency, particularly not HEW, was proceeding on the assumption that they had to trace every single dollar received by a school district before they could decide if a discrimination investigation could proceed. Not even those who wondered whether HEW was doing enough vigorous enforcement through the agency was doing complex analyses of where the money was being spent. The assumption was that there was basic title VI coverage of the entire school district.

Mr. Chairman, the *Finch* decision in the 5th Circuit in 1969 proved that the assumption was correct. Another important decision we were aware of was the *United States* v. *Jefferson County Board of Education* decision in 1966, also from the 5th Circuit Court of Appeals. The desegregation order in that case under title VI included all aspects of school life, including extracurricular activities, athletics and so on, without any inquiry into which activities were supported with Federal aid.

So, if you look back into what we in the Congress understood title VI to mean at the time we adopted title IX, it is no wonder we did not feel it necessary to repeat, every time we mentioned the purpose and scope of the legislation, that we intended broad, institutionwide coverage.

I am aware that from time to time this inquiry into what Congress intended in 1972 has led to debates about what Birch Bayh, among others, had to say. As you recall, I happen to have the privilege of being the chief sponsor of title IX when it was on the Senate floor and before our Judiciary Committee. I also was the floor manager of this bill and was actively involved in the Equal Rights Amendment and other issues involving sex discrimination, so I assume perhaps what I said at that time as far as legislative history may have some impact on the relevance of today's debate.

I believe that my statements at that time were completely consistent with the notion of institution wide coverage. The most important reason is the one I have just mentioned, which is that we were building on an understanding of title VI that had never suggested narrow coverage was intended.

However, another important reason we were very clear about the scope of the new law is that nothing else would have made any sense if our goal was meaningful coverage and effctive enforcement in accomplishing the purpose of stopping discrimination. We knew that the actual number of school districts which had any enforcement actions taken against them under title VI was only a tiny percentage of those which received Federal funds. We knew that only a small number of medical facilities receiving Federal money would be under review at any given time. We knew that the finite resources of the Federal Government would always limit the possibilities for enforcement activity. If we had intended for HEW to trace the money to its precise destination before pursuing allegations of sex discrimination, we would have been dooming this new law to absolute and utter failure.

Fortunately, HEW understood congressional intent correctly and proposed regulations which embodied broad coverage. I might say that prior to this point both political parties and their interpretation of this law and the regulations have been consistent. It has not been a partisan matter, nor should it be a partisan matter. I testified in 1975 before the House Postsecondary Education Subcommittee of the Education and Labor Committee in support of those regulations. I recall the distinguished gentleman from California and the chairman from Kentucky were prominent in their presence at that particular moment. I remember the morning very well. I stated then that these broad coverage provisions were consistent with what Congress intended when the law was passed.

I realize that because title IX, title VI, section 504 of the Rehabilitation Act, and the Age Discrimination Act are such strong measures that they will always be controversial to some people. I realize that passage of this legislation will not be easy, even with the impressive array of cosponsors already supporting it. I realize that the civil rights struggle I am proud to have been a part of face challenges different from those of the 1960's and 1970's. But I am not cynical enough to believe that the 98th Congress will refuse to set right the effects of the Supreme Court's mistaken interpretation of what Congress intended in 1972. I am confident that this Congress will prove just as willing as the 92d Congress did to address this problem squarely and, let me suggest, courageously.

These are tough laws and they merited careful review when they were enacted. We should not be reluctant to handle the tough questions that may arise about what they mean. But we should never, never under any circumstances turn the clock back once we have had the courage to pass strong laws that make discrimination tough to get away with. That's really what this legislation struggle is about, and I am proud, as I said a moment ago, to have played a very small part then and to be asked to play some very small part today.

Here we are, Mr. Chairman, 30 years to the day after the Supreme Court's decision in *Brown* v. *Board of Education* with an opportunity as a Nation to reaffirm the strength of our commitment to equality of opportunity. Twenty years after the passage of title VI we have an opportunity to reaffirm what we meant when we said as a Nation when we enacted that law—that the benefits of Federal money carry the obligation not to discriminate.

We can be proud of the fact that in 1972 we took the step of extending that principle to sex equity in education, that in 1973 we recognized it must also apply to those who are disabled, and that in 1975 we acknowledged our duty to older Americans who have given so much to all of us.

Now Congress has an opportunity to clarify the reach of those laws. If Congress acts promptly, we will have new legislation signed into law before the dangers of the *Grove City* decision take full effect. We cannot afford to wait and see what the results of inaction will be. We know too well from past experience that discrimination does not occur without strong, well-enforced laws to prevent it.

The laws which H.R. 5490 will amend are central to the Federal civil rights machinery of this entire Nation. I am proud to have participated in the enactment of three of them, and to have chaired the Senate subcommittee with jurisdiction over the others. Based on those experiences, I cannot overstate my conviction that this legislation is correct in its substance. It is necessary as a matter of effective civil rights law enforcement, and it is just as right morally and ethically as the original statutes it amends. I strongly support your efforts and encourage others to take the swiftest possible action on H.R. 5490.

I might just add one extemporaneous thought that I think is basic to what we're all about here. That is, there is a good deal of concern about the intrusive power of the Federal Government. For those of us from small communities and out in the heartland, where some of my friends hail from, perhaps, this is felt more sensitively than in other places. But interestingly enough, Mr. Chairman, the only thing one needs to do to avoid Federal Government involvement and the implementation of this or any other legislation in this area is to stop discriminating. That's all they have to do, just treat all Americans equally. It seems to me this is not too stringent a test to set 200 years after this Nation struck out on this being a unique opportunity for all citizens to be equal.

I thank the members of the committee for their patience.

Mr. HAWKINS [presiding]. Thank you, Senator. It was a very excellent statement. I am sure there will be a lot of questions as a result of your excellent presentation.

Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I apologize to Senator Bayh for being late. I was testifying on statehood before Congressman Walter Fauntroy's subcommittee. But it is a very exciting moment for all of us here to have you as a witness, Senator Bayh.

Your career in the Congress was a very bright star in the constellation of civil rights, and that is why we wanted you to come and tell us what you had in mind back in the seventies when you were such a moving force in the enactment of this important legislation.

I might say, Mr. Chairman, that the Judiciary Subcommittee that I chair is honored to be a part of this process with the great Committee on Education and Labor. I have no questions, thank you.

Mr. HAWKINS. Thank you.

Mr. Jeffords.

Mr. **Jeffords**. Thank you. I would like to commend you on your statement. Certainly your understanding of what led up to the legislation which we are considering. Your comments will be very helpful to us.

Have you had an opportunity to examine closely the legislation itself? I know you were asked here for the legislative history, but I would like to know first of all if you believe it accomplishes the purposes which we wants to accomplish, and secondly if, as some of the critics have said, it does go too far.

Mr. **Bayh**. Yes and no.

Mr. **Jeffords**. OK. Thank you. [Laughter.]

Mr. **Bayh**. I think that's the shortest answer I have ever given.

Mr. **Jeffords**. That's all I wanted to hear.

Mr. **Bayh**. Basically what we are doing is just restoring the law to where it was before the Supreme Court's decision, and I think this language accomplishes that very well, Mr. Jeffords.

Mr. **Jeffords**. I appreciate that. I like that kind of answer.

Mr. **Hawkins**. Mr. Ford.

Mr. **Ford**. Thank you, Mr. Chairman.

It is a pleasure to see you back here, Senator. I had the privilege of working with you when you were from the lesser State to the south of Michigan, representing them so ably for many years. I stood with you in 1968 and I am still picking the splinters from that one.

I would like to say, as we say over here occasionally, that I associate myself with the remarks of the gentleman from Indiana. Your recollection and mine of that period are the same. And you made one point that I think needs reemphasis.

We passed title IX during the Nixon administration. It was signed into law by President Nixon. It came out of this committee, virtually with the unanimous support of both political parties. I don't remember any partisan argument that intruded in the consideration of title IX in its whole treatment by this committee, and it ultimately became an amendment to our Higher Education Reauthorization Act of 1972, I believe.

But we did start to have difficulty after enactment with administrators who read more into the act. Our problems in the early stages, if you recall, were not with people who said we didn't mean it; it was with people who said we meant, perhaps, a little bit more than we meant. You will recall all the hue and cry when they stopped mother and daughter banquets someplace in the Midwest——

Mr. **Bayh**. Girls State and Boys State, the American Legion.

Mr. **Ford**. And then there was a school in the Midwest that had a boys' a capella choir, selected at that time when boys haven't yet changed from sopranos to baritones, and didn't have any girls in it. An unwise school superintendent ruled that they had to discontinue that. That wasn't the kind of thing we were trying to get at.

Actually, as the chairman of the Postsecondary Education Subcommittee for several years, I had to deal with the athletic regulations during Joe Califano's time, which was probably one of the greatest problems that we had, in trying to figure out what equality means, not what we were trying to do, but what does it mean—how do you interpret it. I can't remember ever being confronted since 1973 with something like the *Grove* approach, although we have heard of this. We have a fellow in Michigan with a little college that always starts his speech by saying "We gave a woman a degree at this college around the turn of the century; therefore, we are not discriminating and not discriminatory in nature. However, we think it is wrong for you to tell us that we should conform to something because the Government decides we should conform."

I am glad that you make the point that we aren't asking anybody to conform with anything in terms of doing something that they properly would like to do, but ask them to quit doing something only when it is improper.

The implications of this court decision—although they did not go off on very high-sounding constitutional grounds when they came to their conclusion—are the kind of things that are in political arguments, not in decisions one expects from the court. The court literally threw it back to us and said, "Well, what we are doing is interpreting the statute in terms of what the Congress really would have meant if they knew what they were doing."

Your background, personally, and the background of the people involved with the previous Federal legislation on equality of treatment for people in a whole variety of ways was nibbled at piece by piece. The 1964 Civil Rights Act, a landmark piece of legislation, was a nibble. I can remember then the big argument was over Mrs. Murphy's boarding house—how many beds did she have to rent that night before she had to quit discriminating against people who were tired and looking for a place to sleep.

We were still in the stage where we had young people being arrested for sitting in restaurants on college campuses that refused to serve people at a lunch counter because of the color of their skin. Those things were nibbled at very gently, but by the time we got to this, we said, "Well, there seems to be an oversight in the interpretation of people out there about how far we meant to go, so we have to deal very specifically particularly with the peculiar—Now it looks peculiar—it didn't look so peculiar then—pattern that developed in the educational system across this country with respect to the education of females.

I think that of all the efforts we made in civil rights, that a case can be made that, in effectively changing the pattern for the future of people who were literally locked in a stagnant code of practice for all the history of this country, has been as dramatic with the enactment of this legislation as it has with any of the others, not to denigrate in any way the importance of the others. But it has to be looked at when trying to legislate in terms of not being a progressive step to go further, but to merely keep the promise made over 200 years ago about what this country was all about, in an area where, as a result of the previous experience, we had a greater understanding as a country than before.

I would like to just compliment you for all of the efforts that you put in on this and so many other pieces of similar legislation during your career and tell you how much we miss you. We thank you for a short, concise statement that really says what I think you would find would be the reaction of virtually everybody who was involved with this legislation, and the more difficult problems of regulation implementation thereafter.

My recollection was that it took the administration almost 3 years to write the regulations after we passed the act, and they were painfully detailed. There were a lot of little questions raised one way or another, but none of them went to the basic question of what it was the act was supposed to do. If you look back at the error in favor of overstringent regulation or overbroad interpretation, that naturally was assumed by everybody who was active in the field at that time, it's a little easier to understand what a radical departure it is now for us to turn this issue into a political issue and make it a devisive political issue at a time when it should have been behind us for a long while.

I really don't see what is served, what good purpose would be served, if the Congress now, in the face of the Court saying "there's a little bit of fuzziness here, and since you didn't clear it up, we will be compelled to say that this present state of the law is as follows" and they wrote their decision accordingly.

I don't quarrel with the accuracy of their decision. They had a judgment to exercise. It is really an indictment after the fact, "Monday morning quarterbacking," the skill of the people who put the legislation together in the first place. I think the gentleman from Vermont was asking you the same question that all of us want to ask, is this bill now the proper and properly nailed down piece of legislation, so that we don't have the possibility of this continuing as a political argument before the courts that would lead to further *Grove City*-type interpretations. I think it is fair to say that that is the purpose of all of the cosponsors and others not on the bill who are supporting it. But there is a little bit of uneasiness that comes up, that "well, are we rushing slapdash to do it, or is this the way to do it?"

You answered rather quickly, "Yes, it does get the job done." I trust that what that means is, with your years of experience directly in the field, and your expertise in the field, that you're satisfied that this meets the test of restating the congressional intent and meets the quibble of the Court?

Mr. **Bayh**. Yes, sir, I am, Congressman Ford. I must confess, I guess my emphatic, unequivocal answer is nevertheless followed by a bit of fear and trepidation, because I cannot see how the Supreme Court or a Solicitor General or an Attorney General, and those to whom these individuals are responsible within an administration, could look at the existing language and reach the interpretation they have.

So, I suppose, although all of us have tried to define this more specifically, I thought the previous language was as plain as the nose on my face, and that it was rather plain as to what we meant and, as I tried in my statement to point out, that the rush to judgment on title IX was not a rush to judgment taken in a vacuum, but it was predicated on all that had gone before. The record is replete with specific references thereto.

So my only hesitancy to say, "yes, sir," is that I would have said, "yes, sir" if anybody asked me what the interpretation of the present language is, because it had been borne out by the officials in the Ford administration, the Nixon administration, the Carter administration, people of all parties. It was rather clear to me.

Why the Court raised doubt or had doubt and turned the clock back, I don't know.

It seems to me what you are doing and what I am here supporting enthusiastically is to say to the Supreme Court, "Gentlemen, with all respect, we feel your interpretation of what we intended when this law was passed is inaccurate, and we will help clarify that for you so that you can reach a different decision if this matter comes before you again."

I must say, I think the gentleman from Michigan stressed the importance of this title IX provision, as far as women are concerned, very much as I felt it at the time. I think probably there still today exists a greater degree of lack of understanding as far as the invidious nature of discrimination against women than existed in the minds of most of our citizenry, as far as discrimination against minority groups which were dealt with prior to title IX. There is something about us that sort of took women as being a part of society generally and did not look below the surface to see what was actually happening when women were discriminated against.

Take physical education, for example. I remember that my father, who was an educator for 53 years, ended up his career as director of physical education for the public school system in Washington. My dad was not a flag waver. He was a good, strong, God-fearing man who wanted kids to get a good education. But I remember his telling a story that when I was very small—and I didn't understand it at the time—how he was going to testify before the House and Senate District Committees for the budget of the District of Columbia at the time. One of the real problems then was physical education.

We get all tied up on whether girls should play football, or be sumo wrestlers, or some of the more obvious athletic pursuits, and we ignore the fact that just in plain physical education, as my dad said, a girl needs a strong body to carry around her mind just like a boy does. We ignore things like that. We weren't talking about a minority group. We are talking about a majority group, a majority of Americans who were being discriminated against and, unfortunately, still are in too many instances.

Mr. Ford. Thank you.

I just thought of something, as you were talking. A year or so ago the Carnegie Foundation sent me a study that they had done, starting in 1973 through the year 1982, they looked at the number of degrees granted in this country by sex in law, medicine, architecture, engineering, dental, and education. If you look at the graph that study produced, you see that consistently in all but one category the professional degrees being granted, and the percentage of women receiving those professional degrees, made a constant rise during that period of time. It was a little bit more slowly from 1973 to 1975, but in 1975 it really took off.

The graph for education shows you something that tells us about a different problem we have and still can't face up to, and that is that the percentage of females receiving graduate degrees against males has gone at almost the same pace downward. We still graduate more females than males from schools of education, but the percentages have changed very dramatically.

That is good and bad news. It is good news in terms of the efficacy of the reaction of educational institutions and the people in those institutions in their thinking process in directing and assisting women to full equal access to educational opportunities. But it also tells us something about the public education system in this country. A dean of education in a Texas school said in my presence a few months ago that, in the book that he's writing to summarize his lifetime of observations of how we do and shouldn't have done, haven't done and should do, things in preparing teachers, that we have had a system that depended on a readily available supply of low-cost employees, to wit, women, and that the American public school system from the beginning of this country was supported on cheap labor provided by women who would work for less than men at the same job, and that those days had now ended and, therefore, he said what these figures from the Carnegie study showed him was that the best and the brightest of more than one-half of our population were opting for more rewarding professional careers, just as young men had been doing ever since the beginning, in roughly the same kind of proportion—roughly, I say, because there are other considerations, job opportunities and reluctance in the greater public to accept the woman engineer. That is still a problem, as well as acceptance of the woman doctor and the woman lawyer.

But the education system, unlike its past history, has led the thinking of the country in providing the opportunity. I would like to believe that a good deal of the reason for that change was Congress recognizing by legislation that the old system wasn't working and that the old traditions really had no foundation in fairness, justice, or commonsense, and that the country has, indeed, reacted to it.

It is really sad to look and see the success when measured in those terms of what wasn't a new idea, just a new expression of an idea that a lot of people had had for a long time, and then now say we have a political argument about whether that success was worthwhile.

I don't have the foggiest notion what those who applaud the *Grove City* decision really expect will happen that will contribute to the strength of this country and to the strength of us as an American people. I can't find in any of their discussions any advocacy of how this will make things better for us as a country and better for us as a people and public policy that can do neither doesn't still yet, after 20 years here, make much sense to me.

I think there is a great urgency to not only pass this legislation, but to once again reaffirm that we are living in an era where this kind of an issue is no longer a partisan issue to be argued by politicians seeking to hold or obtain office, but a matter of the public conscience and the action of this Congress responding to that public conscience to protect something that we have already accepted.

There is no indication to me either with the quibbles we have had of any public reaction against the initiatives of this initial legislation, and every indication that it has succeeded beyond the fondest dreams of anybody who worked on it and doing precisely what it was intended to do.

I think a piece of legislation that has that kind of a record is rare, especially for modern times, and it is something well worth protecting. The Congress has a duty to move quickly and expeditiously and, if you will, give the President a chance to jump the so-called gender gap by having a bill signing ceremony celebrating this before the election. I would like to see us do that before the President this year.

Mr. **Hawkins**. Thank you, Mr. Ford.

Mr. Erlenborn.

Mr. **Erlenborn**. Thank you, Mr. Chairman. I don't have any questions. I arrived late and didn't have an opportunity to hear you, Senator, or those who testified before you.

I would just make one observation. Regardless of how one feels about the basic question of the protection of civil rights and women's rights, it would appear to me—and I know that I was a minority, a very small minority, when the House passed the resolution trying to affect the Supreme Court's pending decision—it would appear to me that the Court's decision struck a blow for the proposition that if we are to be able to communicate with one another, we must protect the English language and its interpretation. If we twist it, stretch it, and make words mean what they clearly did not intend to mean, we are going to lose the ability to communicate with one another. I cannot for the life of me see how one can read the words "program" and "activity" and believe that they mean institution. The word "institution" was available to the Congress at the time we enacted the law in question. We didn't use the word. We could have. If we meant it, we should have used that word. As I say, regardless of your stance on civil rights, I think it is awfully important that we not try to accomplish our ends by avoiding the legislative process.

This question could have been settled long before the Supreme Court rendered its decision by merely amending the statute and saying "institution" where "program or activity" was the current language.

But rather than do that, there were those who would try to achieve their ends, not by going through the legislative process, but rather by trying to make people believe that "program or activity" really meant institution. So I do applaud the Supreme Court decision from that standpoint, that if we are to be able to understand one another, to communicate, we must protect the meaning of the English language and not twist it out of shape to the extent that nobody will understand what anybody else is talking about in the future. We will get to that time of "newspeak", where people can say anything they want and then put any interpretation they want on it. I think clarity in legislation is awfully important.

So I want to thank you, Mr. Chairman, for giving me the opportunity to make this observation. I am going to watch very carefully the legislative process on this legislation and look forward to hearing the witnesses to see whether we are, as some of the witnesses have already said, making no substantive change but merely making the law do what we intended in the first place, or whether there might also be some substantive change incorporated in the pending legislation.

Thank you, Mr. Chairman.

Mr. **Bayh**. Mr. Chairman, could I make one brief response to Mr. Erlenborn?

Mr. **Hawkins**. You may.

Mr. **Bayh**. He didn't miss anything by not hearing my remarks, let me hasten to say. I would, as one who was intimately involved in the initial choice of words—I'm not certain I chose them, but I certainly put my stamp of approval on them--I would be the first to suggest that there might be better words.

I find it rather interesting that it took all of these years and this particular Supreme Court to have any doubt about what previous Supreme Courts and previous Attorneys General found very clear in the intention of our language. If this helps be more definitive, then let's go at it.

I would be very surprised if people who were really pushing the *Grove City* case would change their overall opposition to title IX, regardless of what words are used. They are trying to accomplish a purpose far different than the very salutory one of the gentleman's effort of trying to be more definitive in the choice of words. I don't think that battle is going to change. There are just some people who are not as sensitive about discrimination as others.

As I said earlier, the only thing you have to do to get out from under the provision of this language or any language is to stop discriminating.

Mr. **Erlenborn**. I find your observation quite interesting, Senator, because in the *Grove City* case, as I understand it, there was no charge of discrimination. We're not talking in Grove City about a school that was guilty of discrimination and, as far as I know, they were never charged with discrimination.

Now, you may tell me that I'm wrong, and I stand ready to be corrected, but that was not the question in the *Grove City* case. That college was always open to both sexes on a nondiscriminatory basis. They had never practiced discrimination. That wasn't the issue before the Supreme Court.

Now, am I wrong?

Mr. **Bayh**. The college refused to take the steps necessary to show that they weren't. I mean——

Mr. **Erlenborn**. Tell me, did anyone ever accuse them, or do you know of any facts that would lead one to believe that they were guilty of discrimination? This was a question of the extension of the power of the Federal Government in an area where they really weren't even trying to accomplish the purpose of the statute.

Now, can you tell me whether they were ever even charged with discrimination, or are you aware of any evidence that would lead one to believe that they were guilty of discrimination?

Mr. **Bayh**. We never got quite that far, Congressman, because——

Mr. **Erlenborn**. It never got that far? They existed for a hundred years and they never had the opportunity yet to be accused of discrimination?

Mr. **Bayh**. They refused to take the steps that most nondiscriminating universities were quickly and readily willing to do to show that they weren't. Why they made a big deal out of this, I frankly don't know.

Mr. **Erlenborn**. I think it's very obvious. They made a big deal out of it because they did not want any entanglements with the

Federal Government. It was their purpose, for which they had very carefully avoided taking any Government subsidies, any Government benefits, so there would not be that entanglement. I mean, it's very clear what their purpose was.

They have found that they probably will not be able to avoid that entanglement. Part of the Supreme Court's recent decision did extend the force of the law to the institution. So that clearly was their purpose. Their purpose was not to avoid the impact of the law so they could continue discrimination already existing, or institute discrimination, because they have never been charged with it, nor is it their purpose, as I understand it, to ever engage in discrimination. That really wasn't the issue before the Court.

But I get back to my initial observation, that if we are, as a society, to be able to continue to communicate with one another, we must be more careful about using words that have the meaning that we intend. After 20 years in this Congress—and I participated in the debates as a member of this committee and in many other debates. After 20 years in this Congress, I am tired of people trying to change the meaning of the law by putting something in the committee's report or twisting the meaning of what is otherwise clear language in the law. Let's say what we mean and I think as a society we'll get along a lot better.

Mr. HAWKINS. Mr. Kildee.

Mr. FORD. Mr. Kildee, would you yield very briefly?

Mr. KILDEE. Certainly. I would be glad to yield to the gentleman from Michigan.

Mr. FORD. John, the staff has just called to my attention the fact that from the school year 1976–77 through 1983 the school that you're talking about, that doesn't want any Federal entanglement, received over a million dollars in Pell grants. Figuring the normal ratio for a school of that kind, that means that they probably had four times that much in Federal loan guarantees for GSL loans, which you and I are strong supporters of.

I submit that the Court improperly didn't take a look at the fact that they had been entangled. They have been doing everything except "getting married" in all these years. They've had all the fun and just didn't want to solemnize the arrangement in any way.

Mr. ERLENBORN. Would the gentleman yield?

Mr. FORD. And we're going to hear on Friday, I understand, from a school in Michigan that's doing the same thing.

Mr. ERLENBORN. Would the gentleman yield?

Mr. KILDEE. I yield to the gentleman from Illinois.

Mr. ERLENBORN. I thank the gentleman for yielding.

Let me just say that I find my colleague from Michigan's observation interesting, but he really doesn't answer the question that was initially posed; that is, was Grove City ever accused or have they ever been guilty of discrimination? That really wasn't the question in this case as far as I know. I don't think the gentleman has answered that question.

Mr. BAYH. If the gentleman would yield——

Mr. KILDEE. I yield to the gentleman from Indiana.

Mr. BAYH. It is awfully easy to get confused on what this *Grove City* case said and what it didn't say. But I am certain that the gentleman from Illinois knows not to read *Grove City* to suggest that

Grove City wasn't covered by title IX, that they didn't come under the province of this act, because they did. So as far as entanglement, the Court said they're entangled.

But the question came to where the funds were going to be cut off, and that is where the Court went one way and some of us believe that previous history says it should have gone another way. I'm with the gentleman from Illinois. If there is language we can find to make that clearer than now, let's do it.

Mr. Kildee. If I could say to the gentleman from Illinois, too, we demand certification of compliance for highway funds, compliance for clean air, for clean water, probably for certain insects compliance. We certainly demand that the States certify compliance in many, many areas. I think it is more important that we ask them to certify compliance in the area of discrimination.

Mr. Erlenborn. Would the gentleman yield?

Mr. Kildee. I would be glad to yield to the gentleman from Illinois.

Mr. Erlenborn. I sometimes think we get a little bit wrapped up in form over substance. I think the important question is whether they are discriminating, not whether they have signed some certification. Really, why should we fall into that trap of the bureaucrat worshiping at the alter of paper? Let's look at what they're doing. That's what is important.

Mr. Kildee. I would agree that substance is more important, but I have learned from my 20 years in the legislative process that form very often protects substance. We have to have certain form for that, and form has protected substance. I think asking any group to certify compliance is a reasonable thing. Grove City did not want to certify compliance and I think we have to make sure that when Congress does ask for certification that we see that that's carried out.

I would basically like to say, Senator, that I first met you in the late 1960's at Mackinac Island in Michigan, and I admired you then and my admiration has grown through the years and continues to grow today. I really appreciate, as cosponsor of this bill, your testimony this morning. You bring with you that legislative history, that legislative memory, to help us in trying to remove any ambiguities in the law which I myself, didn't think was there, either. I agree with you. But I do appreciate your laboring in the vineyard for so many years and welcome you here this morning.

Mr. Hawkins. Mr. McCain.

Mr. McCain. Thank you, Mr. Chairman.

Senator, do you feel that the charges, that this particular piece of legislation would vastly expand the power of the Federal bureaucracy and Federal Courts to interfere in virtually every aspect of American life, have any validity?

Mr. Bayh. No, sir, I don't, not unless prior to *Grove City* that was the fact of circumstances that existed. Because what I see this language as doing is returning to the interpretation of the language of title IX prior to *Grove City*, and I certainly don't believe that the circumstances you just described existed at that time.

Mr. McCain. Thank you.

Mr. Hawkins. Mrs. Burton.

Mrs. BURTON. Senator Bayh, I am very pleased to see you. I have known you for many years and am very happy that you're here taking the position that you're taking on this *Grove City* case.

I came late and I am now reading your testimony. I think the gentlemen here at this hearing did very well in expressing what the intent of Congress was and what it is, and if language is necessary to straighten it out, so be it. So we will have another bill to express the way we feel. It doesn't matter whether Grove discriminated or not. It is a matter that they did not understand and they did discriminate, so we have to straighten this out. I am very pleased that Mr. Rodino has a bill and we are going to straighten it out.

I thank you for being here.

Mr. BAYH. Congresswoman Burton, it is a privilege to be with you again, having had the chance to see you in many different circumstances with you and your great husband, and you follow a great tradition that you helped established, because I know how important you were to your husband and it is great to see you here.

If I might just say, Mr. Chairman, I think it is important for us not to leave here with the idea that our passing this language is just going to be an exercise in English and a better definition of words, because if you look at what *Grove City* said and what they were trying to prove, it was that they were not covered under title IX no matter what language is used. Thus, if one is to follow the logical extension of that, if they are not covered because of the type of institution they are, then they can take all those Pell grants and all of the aid that the gentleman from Michigan pointed out and do whatever they want to with them.

At the same time that we're critical of half of that decision we have to remember that Grove City College the Court said to "you are covered under title IX". To deal with the second half of that decision, we are changing the language.

But let's not overlook what *Grove City* was really trying to accomplish, saying that they were above the law, that they were above the mandate that Congress and previous administrations had said that we're not going to let any discrimination go on in our institutions of higher learning.

Mr. HAWKINS. If there are no further questions, Senator, again we wish to thank you for your appearance. Not only did you invoke some controversy, but I think you allowed many of us to relive old memories with you. I certainly recall the days when you and I worked on a problem pertaining to juvenile delinquency and those were very fond memories as well. We thank you for the contribution you have made. I think it certainly proves that many of us do things when we are in Congress that live long after we have left the Congress, and certainly that is true in your particular case. Thanks again for the contribution that you have made.

Mr. BAYH. Congressman, thank you and Chairman Edwards for your thoughtful invitation. I fear one thing hasn't changed, that controversy still follows me.

Mr. HAWKINS. Well, you did an excellent job.

The hearing will continue tomorrow morning in this room at 9 a.m. The hearing today is concluded.

[Whereupon, at 10:40 a.m., the joint committees were adjourned.]
[Material submitted for inclusion in the record follows:]

Prepared Statement of Hon. Norman Y. Mineta, a Representative in Congress From the State of California

Mr. Chairman and members of the Subcommittee, I am an original cosponsor of H.R. 5490, the bill your are discussing today. I am proud to be so closely affiliated with the Civil Rights Act of 1984. It is landmark legislation and must be passed expeditiously.

H.R. 5490 overturns the limiting precedent of the Supreme Court decision in *Grove City College* v. *Bell.* This bill will restore the strength of measures enacted over the past twenty years which provide that federal funds must not be used to support discrimination. Specifically, the bill broadens the scope and coverage to match what was originally intended by Congress in Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

It is unfortunate that we compelled to adjust these good laws again when I feel the original Congressional mandate was clear. Yet the recent Supreme Court decision has warned us that the laws may be narrowly interpreted, so I commend Chairman Edwards and this Subcommittee for acting swiftly to introduce and move legislation that is now crucially needed.

Title IX has had an overwhelming impact on our nation's schools. Slowly, but surely, girls and young women are participating in their school's sports activities and other programs which were previously closed to them. H.R. 5490, we will assure that all students in public schools are fairly treated in the school programs in which they choose to take part, from financial aid, student housing, and scholarships, to athletics, cultural clubs, and campus employment.

Although the Civil Rights Act of 1984 has been introduced as a result of the Supreme Court decision regarding Title IX only, the bill's cosponsors recognize that other civil rights laws must be tightened up to ensure that the Civil Rights Commission and other institutions do not rely on the Court's narrow ruling when enforcing similar statutes.

H.R. 5490 addresses that 1964 Civil Rights Act, one of the most significant pieces of legislation ever passed in the history of Congress. The great humanitarian changes which have resulted from this law are immeasurable, yet we must now act to clarify its provisions. We must work further to build America's commitment to the end of discrimination on the basis of race, color, or national origin. The bill at hand would codify the broad coverage of the Civil Rights Act on its twentieth anniversary.

The disabled in our country continue to progress towards leading normal lives dispite their handicaps. It is our job to protect their rights and help make their lives more fulfilling. The Rehabilitation Act must also be codified because of the *Grove City* court decision, so H.R. 5490 will strengthen the Act's language to ensure that federally-funded institutions act equitably in their treatment of disabled citizens.

Finally, the Civil Rights Act of 1984 addresses the special concerns of the aging in our nation. Under H.R. 5490, the Age Discrimination Act will be broadened and codified to continue our commitment to health, vocational, and educational opportunities for older Americans.

This year's Civil Rights Act is admirable in its comprehensive approach. It brings together our most important civil rights statutes and ensures that citizens with special interests and needs will not be discriminated against by federally-funded institutions. Again, I feel Congressional intent was clear when the laws were originally made, but I am thankful that the process is in place which will allow us to react to the Supreme Court decision quickly.

The changes offered in H.R. 5490 will emphasize that coverage in civil rights laws should be broad so that investigations of discrimination claims can proceed unimpeded. Private litigants and the Justice Department will be allowed to retain the broad jurisdictional basis necessary to prohibit discrimination by recipients of federal assistance. I heartily endorse this legislation, and pledge my strongest support in helping to pass it in the remaining months of the 98th Congress

Thank you for this opportunity to present my views.

Prepared Statement of Hon. Claude Pepper, a Representative in Congress From the State of Florida

Chairman Edwards, members of the subcommittee on Civil and Constitutional Right, I commend you for holding these hearings on H.R. 5490, clarifying the application of title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and title VI of the Civil Rights Act of 1964.

The Supreme Court, in its recent decision in *Grove City College v. Bell*, 52 U.S.L.W. 4328 (1984), held that only a program or activity receiving federal financial assistance is subject to title IX restraints. The financial aid program, alone, of Grove City College is prohibited from discriminating on the basis of sex. Discrimination would be tolerated in other areas of the College, but not in the financial aid office where students receive federal assistance with Basic Education Opportunities Grants. Twenty years of civil rights legislation stands imperiled and the demonstrated intent of the United States Congress has suffered a reverse.

I am deeply concerned with the narrow application of the holding to all civil rights legislation. The Civil Rights Act of 1964 broadly prohibited discrimination in employment, public housing, education and all federally assisted programs. Subsequent legislation strengthened the concepts the act had established, guaranteeing fairness in the expenditure of public funds. President Kennedy reminded the country that "taxpayers of all races" had contributed to those funds. He advised us that justice required that public funds not be expended "in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."

The "Program or activity" language of the Civil Rights Act of 1964 was adopted in every piece of legislation to prohibit discrimination after the enactment of that act.

In 1972, Congress enacted title IX of the 1972 Amendments, outlawing discrimination on the basis of sex under an education "program or activity" receiving federal funds. Congress conveyed its intent that title IX encompass the same broad meaning accorded title IX by adopting the precise language of the 1964 Civil Rights Act.

The Rehabilitation Act of 1973 mirrored this language once more. Section 504 of that act prohibits discrimination of the handicapped in a "program or activity" receiving federal funds.

The Age Discrimination Act of 1975 confronted unjustified age discrimination and barred this prejudice in "programs and activities" that are federally funded. The act was designed to end age discrimination in professional school admissions, adult education, federally funded health care units and vocational rehabilitation. This legislation, like the civil rights' statutes before, was designed to be applied broadly to ensure an end to discrimination in all areas assisted by federal funds.

Assistant Attorney General Wm. Bradford Reynolds has stated his opinion that the *Grove City College* ruling would apply as well to other civil rights statutes.

I am concerned about the application of this ruling to the Civil Rights Act. I am committed to the end of discrimination. I firmly believe that H.R. 5490 is a most necessary piece of legislation that eliminates the restrictive interpretation the Court has imposed on the civil rights statutes. H.R. 5490 broadens the language of the statutes by striking out "programs or activities" and inserting "recipients." this language ensures that the federal government will not support institutions that discriminate.

We have worked diligently to eliminate unfairness that arises in ages biases, and sex, race and handicapped prejudices as well. It is urgent and necessary that we be vigilant to protect the work we had considered completed. H.R. 5490 permits a reaffirmation of the broad language of the civil rights statutes and ensures the effectiveness of the statutes themselves. The civil rights of many are at risk. I strongly urge enactment of this essential piece of legislation.

New York, NY, *May 14, 1984*.

Hon. Don Edwards,
Chairman, Subcommittee on Civil and Constitutional Rights,
House of Representatives, Washington, DC.

Dear Chairman Edwards: As I am unable to appear on the days specified for the hearing to testify respecting the Bill on which you are holding hearings, I am submitting this statement which I would greatly appreciate your including in the hearing:

As I understand it the bill would specifically define the "recipient" of federal aid as responsible for excluding any person on the ground of race, color or national origin from participation in or from being denied the benefits of, or from being subjected to discrimination under any program or activity receiving federal financial assistance all the foregoing as provided under Section 2000(d)(1) of the U.S. Code annotated; (Title VI, Section 602 of the Civil Rights Act of 1964).

While a member of the Senate where I served from the State of New York from 1957 to January 1981 I had a very active participation in the debates respecting the 1964 Act. Indeed, I was specifically concerned with Title VI because of the fact that it sought effective remedies for discrimination invalid and unlawful under our Constitution. In these debates the intent and purpose of the various titles of the Civil Rights Act were very carefully considered and intensively debated. It is my considered judgment that the purpose and intent with which the law was enacted were precisely within the dimensions which the Bill you are considering seeks to achieve and the *Grove College* case decision of the U.S. Supreme Court to which it is addressed changed the thrust of the legislation which we had enacted in 1964 and that, therefore, it is proper for the Congress to define specifically and by law its purpose and intent.

Also, I was very deeply involved in the enactment of the Higher Education Amendments of 1972 and in the Age Discrimination Act of 1975 of which, indeed, I was one of the authors and may view is borne out by the debates, conference considerations and final enactment of these laws as well. I call specific attention to this clause in Section 2000(d)(1) ". . . but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, . . .". I point out that the word "recipient" is indeed contained in this very important clause.

As you would expect as a skilled lawyer myself after so many years of active practice and participation in the House and Senate, I have no wish to reverse the Supreme Court if it can be avoided by legislative action; but the Court itself has recognized through the years of its service to the people that there are often appropriate cases in which where it takes a different view of the purpose and intent of the Congress than the Congress' own view of its purpose and intent. It is quite appropriate for the Congress to act to make clear its intent and purpose by a law.

We had intended that the landmark Civil Rights Act of 1964 should be effective in a variety of situations which we felt were needed to assure the individual rights which should be enjoyed under the Constitution. That purpose is best expressed in Section 2000(d)(1) which I have quoted above which is flat and unequivocal. To make it effective I believe the meaure before you needs to be enacted.

I am sure that the disquiets expressed by the Administration of the ambit of the legislation can be readily met provided it is within the fundamental purpose of the legislation. If we wish to make the promise of Section 2000(d) to wit that "no person in the United States shall on the ground of race, color or national origin, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance" then we must establish that the remedy must be enforceable against the recipient of such "federal financial assistance . . .". The promise to be performed is according to what our Constitution intended.

With all good wishes,

Sincerely,

JACOB K. JAVITS.

CIVIL RIGHTS ACT OF 1984

WEDNESDAY, MAY 16, 1984

HOUSE OF REPRESENTATIVES,
COMMITTEE ON EDUCATION AND LABOR, AND
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
Washington, DC.

The joint committees met, pursuant to call, at 9:10 a.m., in room 2175, Rayburn House Office Building, Hon. Carl D. Perkins (chairman of the Education and Labor Committee) presiding.

Members present: Representatives Perkins, Schroeder, Conyers, Kastenmeier, Sensenbrenner, Jeffords, and Bartlett.

Staff present: John F. Jennings, majority associate counsel, and Electra C. Beahler, minority counsel, Education and Labor Committee; William A. Blakey, majority counsel, Subcommittee on Postsecondary Education; and Ivy L. Davis, majority assistant counsel, and Philip Kiko, minority associate counsel, Subcommittee on Civil and Constitutional Rights.

Chairman **PERKINS**. Today the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary is continuing hearings on H.R. 5490. This bill affirms the broad coverage of the major Federal antidiscrimination laws and is needed because the recent Supreme Court decision in *Grove City* v. *Bell* limited the coverage of title IX.

Our first witness this morning is the Honorable Claudine Schneider, U.S. House of Representatives. We are glad to welcome you here, Ms. Schneider. Go ahead.

STATEMENT OF HON. CLAUDINE SCHNEIDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF RHODE ISLAND

Mrs. **SCHNEIDER**. Thank you very much, Mr. Chairman. It is an honor for me to be here, and I am very grateful for the expeditious way in which you have chosen to hold these hearings so that we might review as rapidly as possible the concerns having to do with title IX and other pieces of legislation that have to do with civil rights and concerns for the handicapped and the aged.

Needless to say, I have been working on behalf of a strong title IX since coming to Congress in 1980. During my first term in office, Senator Hatch had introduced legislation designed to narrow the scope of the title IX law. I recognized at that point that the intended approach would also have a detrimental or narrowing impact on other civil rights laws. I believed then, and I continue to believe now, that the title IX statutes, if it is restrictive, the interpretation would go against the original intent of Congress and it would take the Nation back in time in its commitment to promoting the civil rights of American citizens.

From the day that I introduced the resolution in response to the Hatch legislation, I have put into action, with the assistance of many concerned colleagues, my agenda to ensure that title IX would remain strong and comprehensive. As a matter of fact, I had introduced a resolution to clarify the original intent of Congress, and that resolution passed the House by a vote of 414 to 8. At that time I also pulled together a bipartisan coalition of 75 Senators and Members of Congress that joined me in submitting an amicus brief in the *Grove City College* case.

Mr. Chairman, following the *Grove City* decision I found it to be necessary to take immediate action to rectify the intended scope of title IX, so that within 2 days of the Court's ruling we introduced H.R. 5011. This is the only Federal statute prohibiting sex discrimination in education, and it represents the cornerstone of progress for women, both in academia and in the workplace. It is difficult for many of us to recall the kind of treatment that young people had had prior to the enactment of title IX, but needless to say, there are many examples of blatant discrimination and different kinds of discriminatory policies that were quite commonplace in the American schools and universities.

As a matter of fact, in the early sixties and seventies, the postsecondary institutions often set higher admission standards for the women students than they did for the men. Out of 188,900 freshmen entering colleges and universities in 1972, 44 percent of the women had a B-plus average or better, compared with only 29 percent of the men. Also prior to title IX's enactment, financial aid was awarded differently, depending on sex. For instance, in 1967 the average award of financial aid for men was $1,001, while for women the average award was $786.

So the comprehensive enforcement of title IX did make very much of a difference in eliminating some of these very overt examples of sex discrimination in education. And then, when the Justices ruled to limit title IX's scope in *Grove City,* I, for one, could not sit idly by and allow the teeth to be taken out of this very important piece of legislation. Already, in the 2 months since the Court handed down its decision, at least four universities have been relieved from discrimination suits in direct response to the *Grove City* ruling.

While, as you can see, my overriding concern has been the protection of title IX, the *Grove City* decision brought home the very real possibility that the Federal statutes which have prohibited discrimination against the elderly, against the disabled, and against the minority populations, are now in jeopardy of being weakened and interpreted in a fashion unintended by Congress. Assistant Attorney General Brad Reynolds himself stated after the decision that in his opinion the ruling would apply to other civil rights statutes.

So, as I see it, Congress cannot renege on its commitment to ensure fairness to American women, elderly, disabled, and minority citizens. We must not allow one dime of Federal money to be used toward the subsidization of discriminatory programs and practices.

Title IX of the Education Amendments of 1972, section 504 of the 1973 Rehabilitation Act, title VI of the Civil Rights Act, and the 1975 Age Discrimination Act have gone a long way toward prohibiting discrimination. Needless to say, our Nation is a much better place as a result of these antidiscrimination statutes. Without the hard work and dedication of both the Republican and Democratic administrations, those civil rights statutes would not be nearly as strong as they are today. I am firmly committed to continuing the practice of strong enforcement of the civil rights laws of the land and I have been working with the administration to ensure their support as well. I am enclosing for the record a copy of the letter that I generated to Chief of Staff Jim Baker, signed by 25 prominent Republican Senators and Representatives, in which I urged swift approval of H.R. 5490.

Prompt legislative action is needed to rectify the effects of the *Grove City* decision. We need to embrace a commitment to civil rights that transcends all party lines. We have to once and for all clarify that the Government's commitment to civil rights statutes is strong, and we must ensure the vigorous and enthusiastic enforcement of these laws.

[Prepared statement of Congresswoman Claudine Schneider follows:]

PREPARED STATEMENT OF HON. CLAUDINE SCHNEIDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF RHODE ISLAND

Mr. Chairmen: I am grateful for the opportunity to testify today in support of H.R. 5490—legislation designed to clarify the nation's most important civil rights statutes. I commend my distinguished colleagues, Chairmen Edwards and Simon, for expeditiously acting on this legislation and for their fine work and determination in striving for the goal of eradicating discrimination in our society.

As most of you here today are aware, I have been working on behalf of a strong Title IX since coming to Congress in 1980. When during my first term in office Senator Hatch introduced legislation designed to narrow the scope of Title IX law, I recognized that the intended effect of this measure would be detrimental not only to the Title IX statute but to all civil rights laws. I believed then and I continue to believe now that a restrictive Title IX interpretation goes against the very intent of Congress and takes the nation back in time in its commitment to promoting the civil rights of American citizens.

From the day that I introduced a resolution in response to the Hatch legislation, I have put into action, with the assistance of many concerned colleagues, my agenda to ensure that Title IX remain strong and comprehensive. In November of last year I am proud that my resolution passed the House by a vote of 414 to 8, confirming that Congress does support a comprehensive interpretation of Title IX. Moreover, I received a fine show of bipartisan support from 75 Senators and Members of Congress when I submitted my amicus brief in the *Grove City College* v. *Bell* case.

Mr. Chairmen, following the Grove City decision, I believed immediate action was necessary to rectify the intended scope of Title IX. Within two days of the Court's ruling, I introduced my own legislation, H.R. 5011. As the only federal statute prohibiting sex discrimination in education, Title IX represents the cornerstone of progress for women both in academia and in the workplace. It is difficult for many of us to recall or for young people to imagine, but prior to the enactment of Title IX, blatant discriminatory policies were commonplace in American schools and universities. In the sixties and early seventies, many postsecondary institutions set higher admission standards for the women students than for the men. Out of 188,900 freshman entering colleges and universities in 1972, 44% of the women had B+ averages or better compared with only 29% of the men. Also, prior to Title IX's enactment, financial aid was awarded differently depending on sex. For instance, in 1967 the average award of financial aid for men was $1,001 while for women the average award was $786.

The comprehensive enforcement of Title IX did make a difference in eliminating such overt examples of sex discrimination in education. When the Justices ruled to limit Title IX's scope in Grove City, I, for one, could not sit idly by and allow the teeth to be taken from this vitally important statue. Already, in the two months since the Court handed down its decision, at least four universities have been relieved from discrimination suits in direct response to the Grove City ruling. Despite charges of discrimination at Pennsylvania State University, the University of Maryland, the University of Alaska, and the University of South Idaho, the Office of Civil Rights at the Department of Education will not pursue further investigation into the cases since the discrimination did not occur where federal funds were "pinpointed."

While, as you can see, my overriding concern over the years has been the protection of Title IX, the Grove City decision brought home the very real possibility that the federal statutes which have prohibited discrimination against the elderly, the disabled and minority populations now were in jeopardy of being weakened and interpreted in a fashion unintended by Congress. Assistant Attorney General Bradford Reynolds himself stated after the decision that in his opinion the ruling would apply to other civil rights statutes.

As I see it, Congress can not now renege on its commitment to ensure fairness to American women, elderly, disabled and minority citizens. We must not allow one dime of federal money to be used toward the subsidization of discriminatory programs or practices. Title IX of the Education Amendments of 1972, Section 504 of the 1973 Rehabilitation Act, Title VI of the Civil Rights Act and the 1975 Age Discrimination Act have gone a long way towards prohibiting discrimination. Our nation is a better place as a result of these antidiscrimination statutes. And make no mistake about it—without the hard work and dedication of both Republican and Democratic Administrations, those civil rights statutes would not nearly be so strong as they are today. I am firmly committed to continuing the practice of strong enforcement of the civil rights laws of the land and I have been working with the Administration to ensure their support as well. I am enclosing for the record a copy of a letter I generated to Chief of Staff James Baker, signed by twenty five prominent Republican Senators and Representatives, in which I urged swift approval of H.R. 5490.

Prompt legislative action is needed to rectify the effects of the Grove City decision. We must embrace a commitment to civil rights that transcends party lines. We must once and for all clarify the government's commitment to these civil rights statutes and ensure the vigorous and enthusiastic enforcement of these laws.

[Letter referred to follows:]

Congress of the United States,
House of Representatives,
Washington, DC, April 12, 1984.

Mr. James Baker,
Assistant to the President and Chief of Staff,
The White House, Washington, DC.

Dear Jim, We are writing to bring to your attention legislation scheduled for introduction Thursday April 12, 1984 which we believe clarifies existing laws to guarantee equality of opportunity for all Americans regardless of race, gender, age or physical impairment.

As you know, on February 28, 1984 the Supreme Court made a ruling in the *Grove City College* v. *Bell* case to limit the coverage of Title IX of the Education Amendments to only those programs or activities that directly receive federal funds. The Court in its decision to narrowly interpret the law ignored both the previous regulatory broad interpretation and the original intent of Congress. As you will recall, last November the House of Representatives overwhelmingly voted to support legislation which clarified the comprehensive coverage of Title IX. In addition, 75 bipartisan Members and Senators signed an amicus brief supporting arguments favorable to a broad Title IX interpretation.

As a result of the decision in *Grove City College* v. *Bell*, we believe the Title IX statute must be clarified in order that Title IX be applied in the broad manner consistent with original Congressional intent. Moreover, as a result of the decision, it came to our attention that, like Title IX of the Education Amendments, Section 504 of the Rehabilitation Act and the Age Discrimination Act of 1975 were modeled after Title VI of the Civil Rights Act and therefore could be subject to the same narrow interpretation as Title IX following the Grove City decision. Assistant Attorney General Bradford Reynolds, in fact, stated after the decision that in his opinion the decision would apply to other civil rights statutes. It is our intention in introducing clarifying legislation to prevent any of the four civil rights statutes from being interpreted in a narrow fashion unintended by Congress.

Our bill would make three limited changes designed to restore Title IX, Title VI, Section 504 and the Age Discrimination Act to their intended force and coverage. These include:

Deleting the language "program or activity" and substituting the term "recipient." The effect of this change is to prohibit an entire institution or entity from discriminating if any of its parts receive federal funds.

Adding the term "recipient" to each statute. This definition is modeled on the definition currently contained in the regulations issued under these laws.

Modifying the enforcement section of each statute to delete "program or activity" and substituting the term "recipient". With respect to fund termination as a remedy, termination would occur only in that entity which has discriminated. The remedy, then, is pinpointed.

We would like to emphasize that this legislation does not broaden either the enforcement or the possible remedies of any of the four statutes. It simply clarifies what had been the case prior to the Grove City decision. Furthermore, as Secretary T.H. Bell said after the decision, this new narrow interpretation will require the Department of Education to do additional paperwork and as you well know, we must work to eliminate burdensome paperwork requirements, not create them!

In summary, we believe Administration support for this legislation is crucial at this time. As Republicans, we see this legislation as consistent with the philosophy espoused by our Party and its President. The bill comports directly with the President's call for an "opportunity society." As the President said just last week, he desires an "opportunity society" in which all Americans—men and women, young and old, individuals of every race, creed or color—succeed, are healthy, happy and whole. Our legislation will ensure that equal access and an opportunity for individual achievement is guaranteed to every American citizen.

We ask that the Administration review the legislation and favorably act on it in a timely fashion. We must not allow protection against discrimination for women, minorities, senior citizens and disabled persons to be a Democratic issue.

Thank you for your consideration.

Sincerely,

Barber Conable, Member of Congress; Senator Bob Packwood; Senator Charles Percy; Claudine Schneider, Member of Congress; Senator Robert Dole; Senator Ted Stevens; Barbara Vucanovich, Member of Congress; Hamilton Fish, Member of Congress; Joel Pritchard, Member of Congress; Vin Weber, Member of Congress; Rod Chandler, Member of Congress; James Jeffords, Member of Congress; Tom Tauke, Member of Congress; John McKernan, Member of Congress; Frank Horton, Member of Congress; Senator John Chafee; Senator Nancy Kassebaum; Olympia Snowe, Member of Congress; Jim Leach, Member of Congress; Senator Rudy Boschwitz; William Clinger, Member of Congress; Bill Green, Member of Congress; Lynn Martin, Member of Congress; Guy Molinari, Member of Congress; Senator Charles Mathias; Senator David Durenberger.

Chairman PERKINS. Mrs. Schneider, let me compliment you on a outstanding statement.

I take it from your testimony that you feel title IX doesn't mean much unless we pass this legislation; is that right?

Mrs. SCHNEIDER. That is correct.

Chairman PERKINS. Congressman Hayes, do you have any questions?

Mr. HAYES. No questions, Mr. Chairman.

Chairman PERKINS. Mr. Sensenbrenner.

Mr. SENSENBRENNER. I have no questions, Mr. Chairman.

Chairman PERKINS. Let me ask you, didn't both the Republican and Democratic administrations over the last decade interpret all of these antidiscrimination laws as having broad coverage?

Mrs. SCHNEIDER. Yes, sir. During the Carter administration and prior to the passage of title IX legislation there was no enforcement, but we have had both Democratic and Republican administrations that have very forcefully and broadly interpreted title IX to make sure there was no pinpointing of discrimination whatsoever.

Chairman **Perkins**. You made a very meaningful statement. Thank you very much.

Mrs. **Schneider**. Thank you very much, Mr. Chairman, and I commend you and this committee for expeditiously moving this legislation to the floor for a vote.

Chairman **Perkins**. Come around, Miss Brown. We are delighted to hear from you at this time, and David Tatel and Peter Libassi.

Ms. **Brown**. Mr. Chairman, we felt perhaps we would go in the order of our tenure as heads of the Office for Civil Rights, so Mr. Libassi would be first.

Chairman **Perkins**. All right. You go ahead, Mr. Libassi.

STATEMENT OF F. PETER LIBASSI, FORMER DIRECTOR, OFFICE OF CIVIL RIGHTS, HEW, FROM 1966 TO 1968

Mr. **Libassi**. Thank you, Mr. Chairman, and members of the committee. I am personally pleased to again have the opportunity to testify before you. I regret the occasion that brings us together again.

My name is F. Peter Libassi. I am a senior vice president for the Travelers Corp. I am here today testifying at the committee's invitation and in my capacity as a private citizen. The views I want to state are my own.

During three Presidential administrations I have held various Federal positions, including General Counsel of HEW, Director of the Office for Civil Rights of HEW, and Deputy Staff Director of the U.S. Commission on Civil Rights. In those posts I was involved in the drafting and enforcement of Federal civil rights policies, including titles IX, VI, section 504, and the Age Discrimination Act. These experiences have led me to the inescapable conclusion that the passage of H.R. 5490 is urgently needed to restore to these statutes their original intent and effectiveness.

The Supreme Court's decision in the *Grove City College* case will have a significant and adverse effect on civil rights enforcement. It overturns two decades of understanding and threatens to undermine two decades of progress. Its effect on women, minorities, the handicapped and elderly citizens could be devastating. The decision cuts so deeply into the enforceability of the civil rights laws that its practical effect may be to repeal them. Moreover, this case sends a signal, the wrong signal, that goes well beyond the issues decided by the Court.

To understand the impact of the Civil Rights Act of 1964, it is important to turn our minds back to the turbulent times of the 1950's and 1960's. We too easily forget those times and forget that black citizens in many parts of this country were unable to vote, were excluded from restaurants and motels, and were denied the benefits of programs and activities funded by the Federal Government.

It is almost impossible for us today to grasp the overwhelmingly oppressive atmosphere which prevailed. In every way, blacks were continuously reminded that by both law and custom they were relegated to an inferior status and were continuously denied the most basic rights of citizenship.

It is equally difficult for us to recall the pervasiveness of racial discrimination and segregation in programs supported by Federal dollars. I think we just cannot realize the widespread ranging discrimination which existed against blacks in programs funded with U.S. tax dollars, whether it was admission to colleges and universities, vocational education programs, apartment houses build on urban renewal sites, airports that were constructed with Federal dollars, libraries that denied books to black children, hospitals that would either exclude blacks or force them to use the basements or the old wings, state employment services which refused to refer blacks for jobs, manpower training programs, apprenticeship programs, agriculture extension services, soil conservation programs, on and on and on in over hundreds of Federal programs, over 25 Federal departments and agencies, encouraged support and condoned discrimination and segregation, despite the fact that Federal dollars were involved.

I think it is rather sad that tomorrow we will be recognizing the 30th anniversary of the Supreme Court decision in the *Brown* case that we have to hold these hearings today. It is important that we remember that 10 years after that Supreme Court decision, when title VI was passed, even though a decade had gone by, noncompliance with basic constitutional rights was rampant in this country.

Our Federal court system was flooded with lawsuits brought by black families seeking to ensure equal educational opportunities for their children. Progress in eliminating segregation in education was bogged down in a case-by-case strategy of massive resistance.

Black American citizens endured utter frustration and humiliation in the very programs funded by the tax dollars paid by all Americans.

The objectives of title VI were really quite simple. They provided for simple justice, so that all citizens might enjoy the basic benefits of Federal programs without the stigma of discrimination.

I believe we can show outstanding progress since title VI was passed. We forget that one-room schoolhouses were closed throughout the South, one-room schoolhouses which often did not have inside plumbing for black children. Those schools were closed and the children were integrated in nearby schools. Hospitals, which simply ignored or refused to admit black patients, even in emergency rooms, were required to admit patients and treat them on a nondiscriminatory basis.

It is interesting to note that within a few months after the passage of medicare black patients were moved to integrated wards and for the first time were afforded the same quality of medical care and attention enjoyed by whites.

Colleges and universities which adamantly denied blacks admission are now graduating blacks in large numbers. There is nothing more exhiliarating than to visit a formerly all-white college campus and see the extent to which racial integration is now a fact.

The point I want to make is that despite the pervasive character of racial discrimination in Federal programs, title VI of the Civil Rights Act worked. It brought about change. But the important thing to remember is that progress that was made would simply not have been possible if title VI had been interpreted as now required by the Supreme Court. *Grove City* would have permitted—indeed, that decision would have encouraged—all institutions to avoid their obligations simply by compartmentalizing Federal funds to precise defined programs, leaving the rest of the institution totally segregated.

In other words, what we would have had in that period, we would have had hospitals that would have required treatment of blacks in the medicare ward but not in the pediatric ward. We would have had wards for black patients, wards for white patients, and integrated wards for Federal patients. We would have had elementary school districts which would have been forced by political pressures to create schools for white children, schools for black children, and then schools for federally aided children. In fact, the *Grove City* decision would have meant that we could end segregation in the financial aid program but we would have been unable to eliminate segregation in the classrooms. I think you all agree that we would have had administrative chaos and we would have destroyed any hope of bringing about the desegregation of Federal programs.

Now, when we were drafting the regulations in title VI we were not unmindful of various interpretations that were possible. The narrow construction that was considered was rejected. It was rejected on the basis of our understanding of the legislative intent and on our commonsense about the realities of regulatory enforcement. I think our interpretation of the statute was the only practical interpretation that could have been given.

The progress that was achieved by these statutes, I have to warn you, is not so deeply rooted that it could not now be undone. The *Grove City* decision threatens to erode much of the progress that has been made and it darkens the future for those to whom we have made important moral commitments.

For women, Hispanics, the disabled and the elderly, we have just begun to bring about changes mandated by the civil rights laws. Under title IX, women are just beginning to win educational opportunities previously reserved for men only. Under the *Grove City* decision, that progress could well be reversed and future progress would be made impossible. Vocational and athletic programs which do not directly receive Federal funds could bar women, even though the institutions were otherwise a major beneficiary of tax dollars.

Similarly, we have just begun to see the disabled take their rightful place as productive members of our society, rather than being locked in institutions and homes. Compartmentalizing the enforcement of section 504 to the particular Federal activity receiving Federal funds would bring this progress to a halt. Under the *Grove City* decision, a college could be required to provide a ramp so that handicapped persons could reach the student aid room, but they would not be required to provide a ramp so the same student could reach the library or his classroom.

I think we have to recognize that changes in our society do not come easily. There is always resistance and there is always reluctance to change. Our civil rights laws embody our highest ideals and our most deeply held hopes. The full force of these laws is still needed to protect the opportunities of American citizens. Yet at the very time that women, Hispanics, disabled and the elderly are beginning to make progress, the *Grove City* decision would deny them the legal tools by which they might secure equal opportunities. This is not the signal that needs to be sent to them. It is not the signal that needs to be sent to administrators of these programs, nor to those who are responsible for enforcing them.

It is urgent that the Congress of the United States act promptly to restore the trust and confidence of all Americans in our constitutional and legal system by passing this legislation.

Thank you, Mr. Chairman.

[Prepared statement of Peter Libassi follows:]

PREPARED STATEMENT OF F. PETER LIBASSI, SENIOR VICE PRESIDENT, TRAVELERS CORP.

Chairmen and members of the committees, my name is F. Peter Libassi. I am Senior Vice President for the Travelers Corporation. I am here today testifying at the Committees' invitation in my capacity as a private citizen. The views I state are my own.

During three Presidential Administrations, I have held various Federal positions, including General Counsel of the United States Department of Health, Education and Welfare (1977-1979); Director of the HEW Office for Civil Rights (1966-1968); and Deputy Staff Director of the United States Commission on Civil Rights (1962-1966). In these posts, I was involved in the drafting and enforcement of Federal civil rights policies including Title VI, Title IX, section 504, and the Age Discrimination Act. These experiences have led me to the inescapable conclusion that the passage of H.R. 5490 is urgently needed to restore to these statutes their original intent and effectiveness.

The Supreme Court's decision in the *Grove City College* case will have a significant and adverse effect on civil rights enforcement. It overturns two decades of understanding and threatens to undermine two decades of progress. Its effect on women, minorities, the handicapped, and elderly citizens could be devastating. The decision cuts so deeply into the enforceability of the civil rights statutes that its practical effect may be to repeal them. Moreover, the case sends a wrong "signal" that goes well beyond the issues decided.

To understand the impact of the Civil Rights Act of 1964—which is the model for the other statutes addressed by H.R. 5490—it is necessary to turn our minds back to the turbulent times of the 1950's and 1960's. We too easily forget that, during those times, black citizens in many parts of this country were unable to vote, excluded from restaurants and motels, and denied the benefits of programs and activities funded by the Federal Government. For a black person, exercising the right to register and vote was an act of courage and heroism. For a parent to escort his or her child to a formerly white school was an utterly terrifying experience. A black person who sought to use a wash room in a bus stop reserved for whites risked not only harrassment, but physical harm.

It is almost impossible for us today to grasp the overwhelming oppressive atmosphere which prevailed. In every way, blacks were continuously reminded that by both law and custom they were relegated to an inferior status and were continuously denied the most basic rights of citizenship.

It is equally difficult to recall the pervasiveness of racial discrimination and segregation in programs supported by the Federal Government. While at the U.S. Commission on Civil Rights, before the passage of Title VI, I served as the Director of the Federal Programs Division and was responsible for several major studies of the extent of discrimination in programs funded with federal resources. The studies revealed wide-ranging discrimination against blacks. For example:

Colleges and universities receiving Federal grants denied admission to blacks.

Vocational educational programs restricted blacks to training for menial and low-paying jobs.

Apartments built on urban renewal sites were denied to blacks.

Airports constructed with Federal dollars segregated passengers by race.

Libraries built with Federal dollars denied books to black children.

Hospitals receiving Federal funds kept blacks in basements or old wings, denying them the basic elements of health care.

State Employment Services refused to refer blacks for employment opportunities despite their education and qualifications.

Manpower training and apprenticeship programs funded with Federal tax dollars denied opportunities to blacks.

Agriculture extension service and soil conservation projects were reserved for white farmers and, in other ways, provided inferior services to black farmers.

Tomorrow we will recognize the 30th anniversary of the Supreme Court decision in *Brown* v. *Board of Education* outlawing segregation in elementary and secondary public education. It is important for us to remember that when Title VI was enacted in 1964, even though a decade had passed since the *Brown* decision, noncompliance with basic Constitutional rights was rampant.

Our Federal court system was flooded with law suits brought by black families seeking educational opportunities for their children. Progress in eliminating segregation in education was bogged down in a case-by-case strategy of massive resistance.

Black American citizens endured utter frustration and humiliation in the very programs funded by the tax dollars paid by all Americans.

To quote President Lyndon B. Johnson, "It is simple justice that all should share in programs financed by all, and directed by the government of all the people." The objective of Title VI of the Civil Rights Act was to establish "simple justice" so that all citizens might enjoy the benefits of Federal programs without the stigma of discrimination.

The passage of the civil rights laws, including Title VI, resulted in outstanding progress in protecting the rights of blacks citizens.

Consider that in 1964, only 1.2 percent of blacks students in the South attended schools with whites. Within four years after Title VI was enacted, that figure had risen to 32 percent. Over 400 one-room school houses attended by black students, often without benefit of indoor plumbing, were closed, and the students were integrated in nearby schools.

Hospitals which had denied equal treatment to blacks were fully desegregated in the space of months after the launching of the Medicare program. Black patients were moved to integrated wards and, for the first time, provided the same quality of medical care and attention previously enjoyed by whites.

Colleges and universities which once adamantly denied blacks admission are now graduating blacks in large numbers. There is nothing more exhiliarating than to visit a formerly white college and see the extent to which racial integration is a fact.

That progress, and much more, would simply not have been possible if Title VI had been interpreted as now required by the Supreme Court. *Grove City* would have permitted, indeed encouraged, all institutions to avoid their obligations simply by compartmentalizing their Federal funds to precisely defined activities and programs, leaving the remainder of the institution totally segregated. Had this been true when we sought to enforce Title VI, hospitals would have been required to provide equal treatment in the Medicare ward, but not in the pediatric ward. We would have had wards for black patients, wards for white patients, and integrated wards for Federal patients.

Elementary schools would have been forced by political pressures to preserve schools for white children, schools for black children, and schools for federally-aided children.

Following the example of *Grove City*, we would have been able to end segregation in the financial aid program, but unable to eliminate segration in the classroom.

We would have created administrative chaos and destroyed any hope of bringing about the desegregation of Federal programs.

I along with other Federal officials responsible for the drafting and enforcement of Title VI regulations worked under the direction of the President's Council on Equal Opportunity, chaired by Vice President Humphrey. We were not unmindful of possible interpretations of Title VI restricting its impact to the particular activity receiving Federal funds. That narrow construction was rejected. It was rejected on the basis of our understanding of the legislative intent and on our understanding of the realities of regulatory enforcement.

Thus, we were able to go forward with investigations of institutions receiving Federal funds; conduct the conciliation process which, in general, was highly successful; and bring enforcement actions where necessary—without being hamstrung by counter-efforts to compartmentalize Federal aid. We were not faced with the exhausting, if not overwhelming burden, of tracing the flow of Federal funds in every case. If it were otherwise, our time, personnel, and resources would have been so consumed by audits and litigation that there would have been little or no progress.

Our interpretation of the statute was the only practical interpretation it could have been given.

The progress achieved by these statutes is not so deeply rooted that it could not now be undone. The *Grove City College* decision threatens to erode much of that progress and darkens the future for those to whom we have made important moral commitments.

For women, Hispanics, the handicapped, and elderly—we have just begun to bring about the changes mandated by our civil rights laws. Under Title IX women are just beginning to win eduational opportunities previously reserved for men, including participation in vocational education and athletic programs. Under the *Grove City College* decision, that progress could well be reversed and future progress made impossible. Vocational and athletic programs which do not directly receive Federal funds could ban women even though the institution were otherwise a major beneficiary of tax dollars.

Similarly we are just beginning to see the handicapped take their rightful place as productive members of our society rather than being locked in institutions and homes. Compartmentalizing the enforcement of Section 504 to the particular activity receiving Federal funds would bring this progress to a halt. Using the situation in the *Grove City College* decision as an example, a college could be required to provide a wheelchair ramp to the financial aid office, but it would not be required to provide a ramp for the very same student to use the library or science labs.

Changes in our society do not come easily. There is always resistance and reluctance to change. Our civil rights laws embody our highest ideals and our deepest held hopes. The full force of these laws is still needed to protect the opportunities of American citizens. Yet at the very time that women, Hispanics, the handicapped, and elderly are beginning to make progress, the *Grove City College* decision would deny them the legal tools by which they might secure equal opportunities. This is not the "signal" that needs to be sent to them or to the officials and administrators charged with enforcement of, and compliance with, these statutes.

It is urgent that the Congress of the United States act promptly to restore the trust and confidence of all Americans in our Constitutional and legal system by passing this legislation.

Chairman **PERKINS**. Go ahead, Mr. Tatel.

STATEMENT OF DAVID S. TATEL, FORMER DIRECTOR, OFFICE OF CIVIL RIGHTS, HEW, FROM 1977 TO 1979

Mr. **TATEL**. Mr. Chairman, members of the committee, my name is David Tatel. I served as Director of HEW's Office for Civil Rights from 1977 to 1979. During that time, OCR was responsible for enforcing title VI, title IX, section 504, and the Age Discrimination Act. I appreciate this opportunity to appear here this morning to share with you my views on H.R. 5490.

I support its enactment because it will restore the jurisdiction of these important civil rights statutes to what it was prior to the *Grove City* decision.

HEW's interpretation of these statutes evolved in connection with title VI of the Civil Rights Act of 1964, the first of the statutes enacted by Congress. HEW interpreted section 601 of the statute broadly to prohibit discrimination throughout an institution which received Federal financial assistance. That interpretation was based on the language of the statute, its legislative history, and the well-accepted constitutional principle that Government steer clear from providing Federal funds to institutions which discriminate on the basis of race.

Since title IX, section 504 and the Age Discrimination Act were based on title VI, and used virtually identical language, HEW extended that broad interpretation to those newer statutes as well. They, too, were interpreted to prohibit discrimination throughout an institution which had a program or activity that received Federal financial assistance.

Prior to the *Grove City* decision, OCR would have applied this interpretation to Grove City College essentially as follows: if the Department had received a complaint about the college, or if it on its own had elected to conduct a compliance review, it would have looked throughout the entire college for discrimination, even though the only assistance it received was in the form of student aid. If it found discrimination, for example, in the computer sciences program, it would have notified the college that it was operating in violation of title IX. If that violation could not have been resolved voluntarily, HEW would have either referred the case to the Department of Justice, which was empowered to file suit to require compliance with title IX, or it would have initiated fund termination proceedings at which the Department would have tried to prove that discrimination existed in the computer sciences program and, if necessary, that that discrimination infected the student aid program.

Grove City would now prohibit the Department from challenging any discrimination at the college except that which occurs directly in the student aid program. Since title IV, section 504, and the ADA contain virtually identical language, *Grove City* could also prohibit the Department from challenging discrimination under those statutes unless it first established that the discrimination existed in the student aid program. If that could not be established, *Grove City* could preclude the Department from proceeding any further, even though discrimination under all of the statutes might be rampant throughout the rest of the institution. H.R. 5490, Mr. Chairman, is necessary, I believe, to restore the jurisdiction of these statutes which existed prior to *Grove City*.

The *Grove City* decision causes a number of other serious problems which H.R. 5490 will correct. For one thing, *Grove City* will bring about a bureaucratic nightmare. It will require the Government and recipients of Federal aid alike to hire teams of accountants to trace the flow of Federal funds and armies of lawyers to argue endlessly about what is and what is not a program or activity. The result will be an administrative process which is expensive, burdensome, and ineffective.

Second, the *Grove City* decision ignores the fact that the receipt of Federal financial assistance in one program or activity may well free up non-Federal funds for use in other programs or activities in the same institution. There is absolutely no reason why a person discriminated against in the latter program should be entitled to any less protection from the Federal Government than a person discriminated against in a program which directly receives Federal assistance.

Third, the *Grove City* decision is likely to cause many people protected by title IX and the other civil rights statutes to abandon the administrative process all together and turn instead to the more cumbersome, more expensive and less flexible Federal courts. The result would be directly contrary to the purpose of these statutes, which was to create a smooth and efficient administrative process for resolving complaints of discrimination.

Finally, Mr. Chairman, and perhaps most important, title VI, title IX, section 504 and the ADA, are not statutes which are evil or onerous or impose burdens which should be restricted as much as possible. To the contrary, the Congress should be seeking ways to broaden these statutes to ensure their effectiveness. These statutes reflect one of our Nation's most fundamental principles, that institutions which benefit from public funds ought not discriminate. The *Grove City* decision permits them to do so and for that reason and that reason alone it ought to be overturned through the enactment of H.R. 5490.

Thank you very much.

[Prepared statement of David Tatei follows:]

PREPARED STATEMENT OF DAVID S. TATEL, FORMER DIRECTOR, OFFICE OF CIVIL RIGHTS, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Mr. Chairman and Members of both Committees, may name is David S. Tatel. I served as Director of the Office for Civil Rights in the U.S. Department of Health, Education, and Welfare from 1977 to 1979. At that time, the Office for Civil Rights was responsible for enforcing Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the rehabilitation Act of 1973 and the Age Discrimination Act of 1975. Those functions are now carried out by the Department of Health and Human Services and the Department of Education. I appreciate this opportunity to appear here this morning to share my views on H.R. 5490, the Civil Rights Act of 1984.

I support the enactment of H.R. 5490 because it will restore Title VI, Title IX, Section 504 and Age Discrimination Act jurisdiction to what it was prior to the Supreme Court's decision earlier this year in *Grove City College* v. *Bell,* 52 USLW 4283 (Feb. 28, 1984). I also support the enactment of H.R. 5490 for additional sound reasons of public policy which I will summarize for you this morning.

HEW's enforcement procedures regarding these important civil rights statutes evolved in connection with Title VI of the Civil Rights Act of 1964, the first of these statutes to be enacted by Congress. The Department interpreted Section 601 of the statute broadly to prohibit discrimination on the basis of race and national origin throughout any institution which was a recipient of federal financial assistance. This broad interpretation was grounded on the language of the statute, its legislative history and the well accepted constitutional principle that all levels of government steer clear from providing public revenues to institutions which discriminate on the basis of race or national origin. As a consequence, the statute was interpreted as permitting investigations of discrimination on the basis of race or national origin throughout the institution so long as any "program or activity" within it received federal financial assistance.

If an investigation revealed a violation of Section 601, OCR would enter into negotiations with the recipient in an effort to obtain voluntarily compliance. If those efforts failed—and they rarely did—OCR would utilize one of the two sanctions set forth in Section 602. One sanction involves referral of the case to the Department of Justice which was authorized to file suit to require compliance with the broad prohibitions set forth in Section 601. The other sanction involves an administrative proceeding to terminate federal financial assistance. Those proceedings, however, are not as broad as Section 601. Funds can only be cut off if discrimination actually occurred in the federally funded "program or activity" or if a federally funded "program or activity" is "infected" by proven discrimination elsewhere in the institution.

Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975 were based on Title VI and in fact utilized virtually identical language. As a consequence, HEW applied Title VI enforcement procedures and standards to these newer statutes. They were thus interpreted to prohibit discrimination on the basis of sex, handicap or age anywhere in a covered institution having a "program or activity" receiving federal financial assistance.

Prior to the *Grove City* decision, the Department would have applied these standards to Grove City College. If the Department had received a complaint about the institution or elected on its own to conduct a compliance review, it would have determined whether sex discrimination existed anywhere in the institution even though student financial aid was the only assistance the school received. If sex discrimination was discovered in the school's computer sciences program, for example, the Department would have notified the institution that it was in violation of Title IX. If the matter could not be resolved voluntarily, the Department would have referred the case to the Department of Justice, or initiated fund termination proceedings in order to prove that discrimination had occurred in the computer sciences program and that it infected the federally financed student aid program.

The Supreme Court's *Grove City* decision limits the application of this broad administrative interpretation. *Grove City* now prohibits the Department from challenging any discrimination on the basis of sex at the College except that which occurs directly in the student aid program. Since Title VI, Section 504, and the Age Discrimination Act contain virtually identical language to Title IX, the Department could likewise be prohibited from challenging discrimination based on race, national origin, handicap or age unless it could first be established that the discrimination occurred in the particular federally funded "program or activity." If no such discrimination was found, the Department could be precluded from proceeding further even though discrimination might be rampant throughout the rest of the institution. H.R. 5490 is necessary to restore the pre-*Grove City* interpretation of these important civil rights statutes.

As I mentioned at the outset, in addition to restoring the previous interpretation of Title VI, Title IX, Section 504 and the Age Discrimination Act, there are sound public policy reasons for enacting H.R. 5490 to overturn the *Grove City* decision. First, the *Grove City* decision creates a bureaucratic nightmare for the government and recipients of federal funds alike. Both will have to hire teams of accountants to trace the flow of federal funds and armies of lawyers to argue endlessly about what is or what is not a "program or activity." It will make the enforcement process cumbersome and expensive to all concerned, and will divert our attention away from the primary concern of both the government and the recipient, namely, elimination of discrimination on the basis of race, national origin, sex, handicap and age.

Second, the *Grove City* decision totally ignores the fact that receipt of federal financial assistance for one "program or activity" may well free-up non-federal funds to be used in other programs or activities in the same institution. There is absolutely no reason why a person who is discriminated against in the latter program—that is, the program which has more local funds because of the receipt of federal financial assistance elsewhere in the institution—should receive any less protection than the person discriminated against in the program or activity directly receiving the federal financial assistance.

Third, the *Grove City* decision, by sharply narrowing Title IX may cause many people protected by Title IX and the other civil rights statutes to abandon the administrative process upon which those statutes largely depend. This would force many more cases into the courts which are more cumbersome, more expensive and less flexible than the administrative process. This result would be contrary to one of Congress' objectives when it enacted these statutes: the creation of a smooth and efficient process for remedying civil rights violations.

Finally, and perhaps most important, the *Grove City* decision is directly contrary to the very purpose of these important civil rights statutes. It makes absolutely no sense to narrow these statutes as the Court has done. They do not, after all, impose onerous or burdensome requirements which should be restricted as much as possible. Rather, they reflect one of our nation's most fundamental principles, namely, that institutions which benefit from public funds ought not discriminate on the basis of race, national origin, sex, handicap or age. The *Grove City* decision permits them to do so, and for that reason it should be overturned by the enactment of H.R. 5490.

In conclusion, it is important to remember that Title VI, Title IX and Section 504 have been responsible for bringing about fundamental changes of enormous importance. Schools have been desegregated; non- and limited English-speaking students are gaining equal educational opportunities; women and girls have had access to educational opportunities previously denied to them for many years; and hundreds of thousands of handicapped people are being brought into the mainstream of American life. But the job is not yet done, and Title VI, Title IX, Section 504 and the Age Discrimination Act have a critical role to play in the future. The *Grove City* decision threatens the effectiveness of these statutes and should be overturned through the enactment of H.R. 5490.

Chairman PERKINS. Miss Brown, go ahead.

STATEMENT OF CYNTHIA G. BROWN, FORMER DIRECTOR, OFFICE OF CIVIL RIGHTS, HEW, FROM 1980-81

Ms. BROWN. OK. I will summarize my remarks and make my statement available for the record.

Chairman PERKINS. Without objection, all your prepared statements will be inserted in the record.

Ms. BROWN. My name is Cynthia G. Brown. I am the codirector of the Equality Center, a nonprofit organization to advance human and civil rights.

I appreciate your invitation to me to testify in support of H.R. 5490, the Civil Rights Act of 1984. Enactment of this legislation is vital if the promise of the great antidiscrimination laws passed by Congress is to continue to be realized.

I have had over 18 years of direct professional experience, both in and out of Government, with the enforcement of Federal civil rights laws. During the Carter administration I was the first Assistant Secretary for Civil Rights in the Department of Education and, prior to that, I was the Principal Deputy Director of the Office for Civil Rights in the Department of Health, Education and Welfare. I was also a career employee of the HEW Office for Civil Rights for 4 years, from 1966 to 1970.

Given my extensive knowledge and very long experience with Federal enforcement of antidiscirmination laws, there was no one more shocked than I was with the Supreme Court's decision in *Grove City College* v. *Bell*. That decision incorrectly and harmfully restricted the coverage of title IX of the Education Amendments of 1972. The decision was surprising because every administration charged with enforcing title IX, as well as title VI of the Civil Rights Act of 1964 after which title IX was modeled, has interpreted coverage of these antidiscrimination laws in the same broad manner.

Furthermore, in the 20 years since passage of title VI, Congress has taken no action to indicate it disagreed with the interpretation of broad coverage by Republican and Democratic administrations alike for title VI or the antidiscrimination statutes patterned after it—title IX, section 504, and the Age Discrimination Act.

H.R. 5490 is intended to respond to the *Grove City* decision and restore for these four statutes the broad scope and coverage intended by Congress and consistently interpreted by the executive branch since 1964. Charges by present Justice Department officials, as reported in the press, that this bill would constitute a major expansion of civil rights jurisdiction for the Federal Goverment and for private litigants are patently absurd.

In the 20 years that this enforcement process has been used, a large number of highly controversial civil rights issues have arisen and been resolved. Fierce challenges have been raised to OCR enforcement policies and practices. But only occasionally have challenges been made to the scope of coverage or other procedural issues under these statutes. None of these coverage challenges have ever been accepted by any administration before the current one. Congress has endorsed no limitations.

An examination of how the process worked in the latter half of th 1960s might be useful. It was during this period that the greatest number of fund terminations took place. In the 1960s, of the statutes amended by H.R. 5490, only title VI had been enacted. It was used primarily to address school segregation in the South, an issue on which little progress had been made desite the passage of 10 years since the Supreme Court decision in *Brown* v. *Board of Education*. From the beginning, Federal enforcers applied title VI on a school districtwide basis. If a school district received Federal funds, discriminatory practices were identified and addressed in every school engaging in such practices, whether or not a federally funded program operated in that school.

The scope of coverage is broad in order to identify and seek resolution of the full range of discriminatory practices in an institution. However, each antidiscrimination statute limits the scope of fund termination. Section 602 of title VI, as well as parallel sections of the other statutes, requires that should fund termination take place, the Department may terminate only those funds were there is a nexus between the discrimination fund and the Federal funding to be terminated. H.R. 5490 preserves this requirement while restoring an agency's broad investigative powers and, by extension, its power to refer cases to the Department of Justice.

The specificity of the title IX and section 504 regulations is another indication that broad application of these laws was intended.

Regulations under title IX were issued by HEW in 1975 by a Republican administration, and the section 504 regulations were issued in 1977 by a Democratic administration. Both sets of regulations are much more detailed than the title VI regulations. Both spell out examples of illegal practices which take place in programs not directly but only indirectly supported by Federal funds. Under the General Education Provisions Act, Congress is provided the opportunity to disapprove an educational regulation in whole or in part by a concurrent resolution. No such resolution has ever passed with regard to title IX or section 504.

The scope of coverage issue was raised from time to time under title IX with regard to intercollegiate athletics. In an opinion of April 18, 1978, the HEW General Counsel—my colleague, Mr. Libassi—reaffirmed title IX coverage of intercollegiate athletics. In addition, congressional failure to adopt proposed exclusions to this coverage makes clear that Congress intended that title IX apply to inter-collegiate athletics.

Great progress has been made in opening access to institutions and programs to those previously excluded through the enforcement of title VI, title IX, section 504, and the Age Discrimination Act.

The *Grove City* decision greatly undermines this important process for achieving equity. Already many institutions are alleging lack of jurisdiction and objecting to OCR investigations. Unless H.R. 5490 is adopted, Federal civil rights enforcement will be permanently damaged. That would be terribly unfortunate because while there has been great progress in providing equal opportunity for program beneficiaries of institutions receiving Federal fund support, the job is not completed. And it may never be if the narrow interpretation of the Supreme Court is allowed to stand.

Thank you, Mr. Chairman.

[Prepared statement of Cynthia Brown follows:]

PREPARED STATEMENT OF CYNTHIA G. BROWN, CODIRECTOR, THE EQUALITY CENTER, WASHINGTON, DC

Messrs. Chairman and members of the committees, my name is Cynthia G. Brown. I am the Co-Director of The Equality Center, a non-profit organization to advance human and civil rights. Among other things, The Equality Center engages in research and analysis of issues of importance to low-income families and individuals, minorities, women, and the disabled. A major activity of The Center is a study of civil rights enforcement in education which will recommend new ways to strengthen the enforcement of federal civil rights laws.

I appreciate your invitation to me to testify in support of H.R. 5490, the Civil Rights Act of 1984. Enactment of this legislation is vital if the promise of the great antidiscrimination laws passed by Congress is to continue to be realized.

I have had over 18 years of direct professional experience, both in and out of government, with the enforcement of federal civil rights laws. During the Carter Administration I was the first Assistant Secretary for Civil Rights in the Department of Education and prior to that, I was the Principal Deputy Director of the Office for Civil Rights in the Department of Health, Education, and Welfare (HEW).

I was also a career employee of the HEW Office for Civil Rights for four years from 1966 to 1970. It was during that period of time that by far the greatest number of administrative hearings were held and that the greatest number of fund terminations took place—procedures and practices directly relevant to the purpose of this hearing, which is to consider the need for enactment of the Civil Rights Act of 1984. Specifically, during those years, I began as an investigator examining southern school segregation problems and became the Special Assistant to the chief of the entire civil rights education program.

Between my two periods of government service, I worked for the Children's Defense Fund and the Lawyers' Committee for Civil Rights Under Law. In each organization, one of my responsibilities was to monitor and comment on the activities of the Office for Civil Rights.

Given my extensive knowledge and very long experience with federal enforcement of antidiscrimination laws, there was no one more shocked than I was with the Supreme Court's decision in *Grove City College* v. *Bell.* That decision incorrectly and harmfully restricted the coverage of Title IX of the Education Amendments of 1972 which prohibits sex discrimination against both students and employee in any educational "program or activity receiving federal financial assistance." The decision was surprising because every Administration charged with enforcing Title IX, as well as Title VI of the Civil Rights Act of 1964 after which Title IX was molded, has interpreted coverage of these antidiscrimination laws in the same broad manner. Furthermore, in the 20 years since passage of Title VI, Congress has taken no action to indicate it disagreed with the interpretation of broad coverage by Republican and Democratic Administrations alike for Title VI or the antidiscrimination statutes patterned after it—Title IX, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

H.R. 5490 is intended to respond to the *Grove City* decision and restore for these four statutes the broad scope and coverage intended by Congress and consistently interpreted by the Executive Branch since 1964. Charges by present Justice Department officials, as reported in the press, that this bill "would constitute a major expansion of civil rights jurisdiction for the federal government and for private litigants" are patently absurd.

In order to demonstrate the absurdity of this interpretation, I thought it might be useful: (1) to review how the antidiscrimination statutes applicable to federal financial assistance have been enforced, especially by HEW and the Department of Education; and then (2) to examine activities at different points in time which demonstrate that broad coverage of these laws has always been intended.

Each of the four statutes amended by H.R. 5490 was enacted to ensure that federal funds would not be used in any way to support discriminatory activity based on race, national origin, sex, handicap, or age. The most aggressive and successful civil rights enforcement activities directed at federal fund recipients historically have been carried out by the Office for Civil Rights (OCR) in HEW and by the two OCRs in the HEW successors—the Department of Education and the Department of Health and Human Services.

Each OCR carries out its enforcement responsibility under Title VI, Title IX and Section 504 by investigating complaints filed by individuals and groups, and by conducting agency-initiated compliance reviews of selected institutions. Before an investigation is begun, OCR determines whether the institution receives federal financial assistance. Since the beginning of these enforcement activities, OCR has assumed jurisdiction to eradicate any type of discrimination prohibited by statute and regulation once an institution was identified as a federal fund recipient. Prior to an investigation no attempt was made to trace federal assistance to the specific activity in which there was suspected or alleged discrimination.

Each statute requires that recipients found to have violated the law be given an opportunity to comply voluntarily. Voluntary compliance is obtained in over 98 percent of the cases. In the vast majority of these cases, institutions readily agree to correct illegal practices when presented with evidence of a problem. In those cases where voluntary compliance is not possible, the statutes require a Department either to initiate administrative proceedings, which could lead to the termination of federal assistance, or to refer the matter to the Department of Justice for litigation.

In the Departments of Education and Health and Human Services where the fund termination process is selected, the recipient is given an opportunity for a hearing before an independent administrative law judge. Decisions of the administrative law judge may be appealed to a Reviewing Authority. Funds can be terminated by the Department Secretary after the Reviewing Authority has heard the case. If funds are terminated, recipients can appeal to the appropriate United States Circuit Court of Appeals.

Age Discrimination Act enforcement follows a somewhat different process. All federal enforcement agencies, including the two OCRs, must forward age discrimination complaints which they receive to the Federal Mediation and Conciliation Services (FMCS) which attempts to resolve them through mediation within 60 days. For complaints not resolved by FMCS, the process described above for the other statutes is followed.

THERE HAVE BEEN FEW CHALLENGES TO EXECUTIVE BRANCH INTERPRETATION OF COVERAGE UNDER THESE STATUTES

In the 20 years that this enforcement process has been used, a large number of highly controversial civil rights issues have arisen and been resolved. Fierce challenges have been raised to OCR enforcement policies and practices. But only occasionally have challenges been made to the scope of coverage, or other procedural issues under these statutes. None of these coverage challenges have ever been accepted by any Administration before the current one. Congress has endorsed no limitations.

An examination of how the process worked in the latter half of the 1960s might be useful. It was during this period that the greatest number of fund terminations took place (Between 1966 and 1982, 220 recipients had their funds terminated by HEW or the Department of Education—197 school districts, 5 higher education institutions, and 18 health or social service facilities. All but 4 of these fund terinations took place before 1970.)

In the 1960s, of the statutes amended by H.R. 5490, only Title VI had been enacted. It was used primarily to address school segregation in the South, an issue on which little progress had been made despite the passage of 10 years since the Supreme Court decision in *Brown* v. *Board of Education*. From the beginning, federal enforcers applied Title VI on a school district-wide basis. If a school district received federal funds, discriminatory practices were identified and addressed in every school engaging in such practices, whether or not a federally funded program operated in that school. For example, districts were required to eliminate segregated high schools even though in many districts only their elementary schools operated federally funded programs, usually under Title I of the elementary and Secondary Education Act. If the reasoning of the *Grove City* decision had been applied back then, it is questionable whether HEW would have been the authority to require the desegregation of such high schools.

The scope of coverage is broad in order to identify and seek resolution of the full range of discriminatory practices in an institution. However, each antidiscrimination statute limits the scope of fund termination. Section 602 of Title VI, as well as parallel sections of the other statutes, requires that should fund termination take place, the Department may terminate only those funds where there is a nexus between the discrimination found and the federal funding to be terminated. In other words, according to the statute, the termination of power "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." H.R. 5490 preserves this requirement while restoring an agency's broad investigative powers and, by extension, its power to refer cases to the Department of Justice.

In the fund termination proceedings of the past such a distinction between broad coverage and more limited termination arose in some cases. The Fifth Circuit Court of Appeals spoke on the issue in 1969 in the case of *Taylor* v. *Finch* clarifying that "the termination power reaches only those programs which should utilize federal money for unconstitutional ends." HEW followed carefully this guidance of the statute and court. For example, in September, 1970 the HEW Reviewing Authority, the administrative appeals body, ruled that the federal funds of the Jasper, Texas, school system must be terminated for all schools in the district despite the fact that only the elementary schools but not the junior and senior high schools remained segregated. The Reviewing Authority reasoned that:

> Absent a unitary school system, any federal money used to assist in the general educational program of such a system would be the utilization of federal money for unconstitutional ends, since the Constitutional requirement is for a unitary system and not for unitized pockets within a non-unitized system. If the program, using federal money, is unconstitutional, then the termination power obtains as to that program. In the instant proceeding, the Respondent's whole general elementary and secondary educational program is unconstitutional because, in maintaining pockets of segregation within its system, it is not operating a unitary, non-racial system.

THE SPECIFICITY OF THE TITLE IX AND SECTION 504 REGULATIONS IS ANOTHER INDICATION THAT BROAD APPLICATION OF THESE LAWS WAS INTENDED

Regulations under Title IX were issued by HEW in 1975 by a Republican Administration, and the Section 504 regulations were issued in 1977 by a Democratic Administration. Both sets of regulations are much more detailed than the Title VI regulations. Both spell out examples of illegal practices which take place in programs not directly, but only indirectly, supported by federal funds. For example, the Title IX regulation states compliance standards for intercollegiate athletics and extracurricular activities. The Section 504 regulation requires the provision of auxiliary aids to beneficiaries of all hospital and social service programs if those institutions or agencies employ 15 or more people. Under the General Education Provisions Act, Congress is provided the opportunity to disapprove an educational regulation in whole or in part by a concurrent resolution. No such resolution has ever passed with regard to Title IX or Section 504.

The scope of coverage issue was raised from time to time under Title IX with regard to intercollegiate athletics. In an opinion of April 18, 1978, the HEW General Counsel reaffirmed Title IX coverage of intercollegiate athletics. In addition, Congressional failure to adopt proposed exclusions to this coverage, makes clear that Congress intended that Title IX apply to intercollegiate athletics.

Great progress has been made in opening access to institutions and programs to those previously excluded through the enforcement of Title VI, Title IX, Section 504 and the Age Discrimination Act. In the education area, the gains have been dramatic:

Schools in the South formerly segregated by law are now desegregated; in 1964, less than one percent of southern black youngsters attended predominantly white schools. By 1980, 43 percent of these students were in predominantly white schools and only 23 percent were in schools with 90 to 100 percent minority student enrollment.

Segregation in the assignment of black and white teachers in virtually every large city in the North (as well as the South) has been eliminated.

Black enrollment in postsecondary institutions increased 92 percent from 1970 to 1979; Hispanic enrollment more than doubled and the enrollment of women increased by 66 percent in the same time period. These figures compare with an 8.3 percent increase in white male postsecondary enrollment between 1970 and 1979.

In 1980, approximately 830,400 limited and non-English-speaking students were participating in bilingual education classes which were rarely offered before the last decade.

Participation of women and girls in interscholastic and intercollegiate sports has jumped tremendously—500 percent in interscholastic and over 100 percent in intercollegiate athletics between 1972 and 1979.

The number of disabled youngsters who needed but did not receive special education declined from 463,000 in 1976 to 22,610 in 1980.

Since the mid-1960s Congress has provided substantial funds for programs to aid students with special educational needs. These funds have provided a federal "carrot" to accompany the federal "stick" of civil rights enforcement, particularly the threat of federal fund termination. The growth in the amount of federal funding has been a powerful stimulus for institutions to settle discrimination cases brought by OCR and has helped bring about the progress cited above.

The *Grove City* decision greatly undermines this important process for achieving equity. Already many institutions are alleging lack of jurisdiction and objecting to OCR investigations. Unless H.R. 5490 is adopted, federal civil rights enforcement will be permanently damaged. That would be terribly unfortunate because while there has been great progress in providing equal opportunity for program beneficiaries of institutions receiving federal fund support, the job is not completed. And it may never be if the narrow interpretation of the Supreme Court is allowed to stand.

Chairman PERKINS. Let me thank all the witnesses. All of the panel have had experience as administrators under three different Presidents which wrote the governing regulations for these major Federal antidiscrimination laws.

Let me ask you, when you administered these laws and wrote these regulations, was there any doubt that these laws had broad coverage of activities of institutions receiving Federal aid, and would these laws have had much effect if their coverage was limited as the Supreme Court said in the Grove City case?

You start, Miss Brown.

Ms. BROWN. Well, there is no question that the laws had broad coverage, and the answer to your question is yes, they couldn't have been effective if the coverage had been limited. As Mr. Libassi made clear in this statement, from the beginning, given the wide range of discriminatory practices that were going on in the country, particularly against blacks, and the importance of title VI as a tool to get at them, there was no question that the consensus of both the administrators of the acts and the congressional intent was there would be broad coverage so that there would be another handle, other than the courts, to get at this wide variety of discriminatory practices.

When the title IX and section 504 regulations were issued, they were modeled almost precisely in procedural aspects after title VI. There was no question whatsoever by either administration issuing them that the coverage would be broad and again be used to tackle a wide variety of programs that were in institutions receiving Federal support but not necessarily directly funded by Federal funds.

Chairman PERKINS. Mr. Tatel.

Mr. TATEL. I agree with that, Mr. Chairman. I think for purposes of these hearings the important thing is that administration after administration which was responsible for fashioning these regulations, and then administering the statutes, interpreted them to be institutionwide. Those who were responsible did it because of a very strong belief that without that institutional coverage the statutes would simply have been ineffective. They would have been too narrow to deal with the very serious problems which concerned Congress when it passed all three statutes.

Chairman PERKINS. Go ahead, Mr. Libassi.

Mr. LIBASSI. Mr. Chairman, when the regulations were first drafted, every section of the regulation was carefully crafted to fit the legislative intent and the language of the statute. This issue of whether or not the entire institution would be covered or not was carefully considered and the decision was made to give it broad coverage.

I have to add, Mr. Chairman, that if we had adopted the *Grove City* decision as our policy, you would have heard from school administrators and hospital administrators all over the South complaining bitterly about the administrative chaos that we would have created. I think you would have grabbed me by the scuff of the neck, Mr. Chairman, and had me up here before this committee questioning me by what authority I had proceeded, in effect, to gut the heart of title VI by adopting such restrictive language.

There is no question that the *Grove City* decision would have totally frustrated the effectiveness of title VI.

Chairman PERKINS. Mr. Jeffords, any questions?

Mr. JEFFORDS. I would like to pass at this time, Mr. Chairman.

Chairman PERKINS. Mr. Hayes.

Mr. HAYES. Mr. Chairman, I just want to compliment the panel on what has been to me a very, very well prepared presentation. I have a couple of questions I would like to raise of any member or all three of the panelists.

As former directors of the Office of Civil Rights under HEW, where you had first-hand knowledge of the performance and adherence to all phases of the civil rights statutes, do you agree, question No. 1, that the *Grove City* v. *Bell* decision is a part of a concerted and conscientious effort to negate gains made during the sixties and early seventies? That's question No. 1.

No. 2, do you see H.R. 5490 as a legislative remedy to halt this trend if your answer is in the affirmative to the first question?

Mr. TATEL. I wouldn't want to imply a motive for the Supreme Court. But I will say that I think the position of this administration in arguing before the Supreme Court for a narrow interpretation of title IX was, in fact, part of its effort to narrow as much as possible the scope of the civil rights laws that brought us so much progress. For the past 3½ years we have had a series of actions by this administration, in the courts and before the Congress, to eliminate or weaken the tools which Congress and the courts have given minorities, women and disabled people for fighting discrimination. I believe that the administration's position in the *Grove City* case was simply another example of that.

With respect to the second part of your question, I think you're absolutely right. H.R. 5490 is a very important step in restoring for the victims of discrimination one of the most important tools which they have had, in the case of blacks since 1964, to bring about the kinds of progress which you have heard about this morning. Without that tool, which has been so effective, I am confident that the chances of continued success, both through the administrative process and through litigation, will be greatly jeopardized.

Mr. HAYES. Thank you, Mr. Chairman.

Chairman PERKINS. Mr. Bartlett.

Mr. BARTLETT. Thank you, Mr. Chairman.

I appreciate the witnesses' testimony and a chance to ask some questions. I come to the hearing in this case with an open mind, although with a healthy dose of skepticism, so my questions will be designed to try to pinpoint precisely what this means and what this bill would do in the real world, so I appreciate your being here and your expertise in that.

Rather than using words such as "broad" and "narrow" for example, I assume that what you mean by those words are the question as to whether it is an institutionalwide application or program-specific application; is that right? I want to get the terminology correct.

Ms. **Brown**. Yes.

Mr. **Libassi**. That is correct.

Mr. **Bartlett**. Could you describe for us how these laws, if this bill were to be passed, how these laws would be enforced? That is to say, is the process that the Federal agency that is doing the enforcement goes to court against a hospital and proves in court that discrimination exists, or is the process that the agency decides there is discrimination and therefore just cuts off Federal funds?

Say in the case of a hospital, I assume that if an agency were to decide that the hospital in some other area is violating—maybe one of their parking garages, for example, is not handicapped accessible. I'm not trying to take it to the extreme. I'm trying to ask if that is the kind of thing that institutionalwide application would mean. If one parking garage for a hospital is not handicapped accessible, does that mean an agency, HHS itself, could therefore deny medicare funding to patients of that hospital without having to go to court?

Ms. **Brown**. In theory, Congressman, that might be right. But let——

Mr. **Bartlett**. Pardon me. In theory, yes?

Ms. **Brown**. Yes. But let me walk through what typically would happen in a case like that.

A complaint would come in that a particular hospital garage is not accessible or does not have a handicapped parking place, or does not allow a handicapped person to have access. The complaint would be filed with the Office for Civil Rights, in this case in the Department of Health and Human Services. They would notify the institution that a complaint had been received. The agency would assign an investigator to it.

They might first contact them by phone about the matter, and the hospital might even go look at the situation themselves and say "oh, yes, we seem to have missed one. This particular parking lot has a problem and we would be glad to take care of it." Or they might say, "we would be glad to meet with an OCR official." An investigator would go out and look at the situation with the hospital officials.

They would then notify the hospital of their findings and they would immediately sit down and try to resolve the matter. In over 99 percent of the cases of complaints or in compliance reviews initiated by the agency, these matters are resolved. It would be extremely rare that they wouldn't be able to negotiate a settlement of this problem.

However, if they couldn't, then OCR and HHS would notify the hospital that it has an opportunity for an administrative hearing before an independent law judge, and the hospital would be able to bring in its own legal counsel and present its side of the story and present evidence that perhaps it was accessible. Perhaps they disagree with the facts in the case. The case would be presented before an administrative law judge and he or she would render a decision.

There would then be an opportunity for an appeal to an appeals body that is established within the Department called the reviewing authority. That three- or five-person panel would review the case and make a recommendation to the Secretary of HHS about whether to terminate funds. Then the Secretary would terminate funds if the funds that that hospital received were somehow related, directly or indirectly, to the discriminatory problem found.

Actually, the fund termination matter is more limited than the coverage issue. There is no question that everything in that hospital was covered in terms of the allegation of discrimination. But if it got to a fund termination stage, they would look to see whether the discriminatory practice affected other operations of the hospital that were receiving Federal funds, or whether Federal funding was indirectly supporting that discriminatory activity—say, perhaps, it was in a building that had been——

Mr. BARTLETT. Let me stop you at that point. So in what you have described so far, there is no court of law involved; it is the Secretary, the agency itself, that makes the decision?

Ms. BROWN. Oh, I left out one last stage, which is after the Secretary terminates, were the Secretary to terminate the funds, the hospital would have the right to appeal to a Federal district court.

Mr. BARTLETT. The hospital could appeal?

Ms. BROWN. Right.

Mr. BARTLETT. After the funds are terminated?

Ms. BROWN. Right.

Ms. BROWN. Then my question becomes what the termination rights are. There is a difference in my mind. I'm not certain what institutionalwide coverage means. Does that mean, in the case of a hospital, for example, that if one parking garage is found to be inaccessible, that all of the Medicare funds for the rest of the hospital could be terminated as remedy? Because that's what institutionalwide coverage means to me. Tell me what the bill says that's different than that.

Mr. LIBASSI. If I could respond to that, if the hospital, as had been the practices in certain hospitals, denied admissions of blacks to the hospital as a whole, Medicare funds would not have been made available to that hospital and it would not have been certified as eligible and it would have been barred from participating in the program. As a whole, it would have been institutionwide.

When it comes to section 504, the regulations require that the programs be accessible. And here we may have differences among the panel. But if there were parking garages for the hospital which were accessible to the handicapped, the law, I believe, would not require that every parking garage be accessible to the handicapped, and that that's the way the regulations in 504 were originally drafted. They provided that the program had to be accessible, not that every facility, every doorway, every stairway, every entranceway needed to be accessible. So program accessibility was the issue.

However, if the program were not accessible, then all the Federal funds would have been cut off.

Mr. BARTLETT. You see, I agree with that. I'm trying to determine whether H.R. 5490 changes that or not.

Mr. TATEL. That was the point I was going to add, Mr. Bartlett. I think for purposes of this hearing it is important to point out that the answer to your hypothetical about the hospital and the parking lot will be exactly the same under H.R. 5490, if it is enacted by Congress, as it was prior to *Grove City.* The statute makes no substantive or procedural changes in the regulations or interpretations of those regulations which prevailed before *Grove City*.

Mr. **Bartlett**. So that the remedy, in your judgment, in H.R. 5490 does not change the remedy; the remedy is only the determination of those program specific funds?

Mr. **Tatel**. That's right. When you get to the question of—there is two parts of the analysis. Prior to *Grove City*, the coverage of the statutes was institutionalwide. The only funds which could be terminated were those which went to the program which discriminated or which were infected by a discriminatory program elsewhere. After H.R. 5490, it is exactly the same. The coverage is institutional wide, but the only funds which can be terminated are those which went to the discriminatory program or which were infected by discrimination elsewhere.

The pinpointing provision is carried through in H.R. 5490, so there would be absolutely no change. The change is between what preceded *Grove City* and the effect of *Grove City*.

Mr. **Bartlett**. One other question—Do the three of you share that answer?

Ms. **Brown**. Yes.

Mr. **Libassi**. Yes.

Mr. **Bartlett**. As to what H.R. 5490 does?

Mr. **Libassi**. Yes. H.R. 5490 does not extend the regulations beyond what they were normally used at in defined——

Mr. **Bartlett**. Does it extend the remedies under the law?

Ms. **Brown**. No.

Mr. **Libassi**. No, it does not.

Mr. **Bartlett**. Is that a universally shared opinion among the other proponents of H.R. 5490 that you know of?

Ms. **Brown**. Yes.

Mr. **Libassi**. Yes, it is.

Mr. **Bartlett**. I appreciate that clarification.

One other question, and that is, by adopting H.R. 5490, does that, in effect, then make coverage—back to the coverage issue—coverage of these discrimination laws essentially applicable to everyone—and I use everyone loosely—everyone who in some way receives Federal funds? An elderly person who is on social security, for example, might be running a child care center; that would extend 504 and title IX and title VI to that child care center? Is that generally the concept, that it would extend it to almost everyone, these laws?

Mr. **Tatel**. No, it would not. Again, H.R. 5490 would restore the coverage which existed prior to *Grove City*. It wouldn't expand that at all. Take your example. Prior to *Grove City*, the regulations that existed made it very clear that that person would not be covered by title VI, section 504, or title IX. The person who receives social security benefits or food stamps is not covered, nor is the agency or store where those funds are spent.

In fact, the *Grove City* decision itself answers that question. Grove City College argued that unless their interpretation were accepted by the court, that welfare payments, social security payments and food stamps would trigger coverage of the statute. The Supreme Court rejected that, just as HEW had before *Grove City*. The Supreme Court said that those kinds of entitlement benefits for the poor are different from student aid. There were several paragraphs of discussion in the case about why that would not trigger that, and that would not be any different under H.R. 5490.

Mr. BARTLETT. So, H.R. 5490 would not change that coverage at all?

Mr. TATEL. No.

Mr. BARTLETT. So the receipt of entitlement benefits does not then cause an institution to be covered.

Mr. TATEL. That's right.

Mr. LIBASSI. That's correct. I agree completely with what Mr. Tatel has just stated.

Mr. BARTLETT. One other very specific question. I was on a city council prior to coming here and we dealt with 504. I support 504 and think it is a very good law. But cities and institutions have to spend money to comply with it in retrofitting older buildings, as you know. I recall that there were some older buildings that we had that were not accessible, so, therefore, we couldn't legitimately receive Federal funds to renovate those buildings, community development block grants, for example, unless we were to make them accessible. That's a good law and that's the way it should be.

I suppose my question is, would H.R. 5490 in any way require a city to retrofit those inaccessible buildings as a condition of receiving general revenue sharing or some other kind of Federal funds?

Mr. TATEL. The answer there is the same as to the other questions.

Mr. BARTLETT. I asked it two different ways.

Mr. TATEL. If retrofitting would have been required prior to *Grove City,* it is required now. If it would not have been required prior to *Grove City,* it would not be required under H.R. 5490. H.R. 5490 carries through exactly the same pre-*Grove City* standards that applied under section 504, so the standards would not be any different at all. It wouldn't expand or narrow the law.

Mr. BARTLETT. Thank you, Mr. Chairman. I thank the witness for their very enlightening testimony.

Chairman PERKINS. Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you, Mr. Chairman. I want to compliment you on these hearings, on the speed in responding to this public issue and the schedule you have outlined for us. If I have any regret, it is only that I have not been able to attend all the hearings.

Mr. Chairman, I have only one question. I think the preceding colloquy has been very useful. I would like to know whether H.R. 5490, in its present form, is entirely acceptable to the witnesses, or whether they have any recommendation whatsoever for amending or changing it.

Ms. BROWN. We have no recommendations for amending or changing it. We think this would do the job and restore each statute to the effective method of enforcement that existed for 20 years.

Mr. LIBASSI. I would only add, sir, that it would be my hope that the Congress would resist the temptation to tinker with title VI in any way—title VI, IX, 504 and the Age Act—through this vehicle. We simply ought to deal with the specific problem that is presented by the *Grove City* decision and not attempt to either add or subtract from the impact of the statutes.

From my reading of the bill, as it is now drafted, it accomplishes that precise function and I believe it ought to be adopted as presented.

Mr. **Tatel**. I agree with that.

Mr. **Kastenmeier**. I thank the witnesses and I thank the Chairman.

Mr. **Hayes** [presiding]. Mr. Jeffords.

Mr. **Jeffords**. I would just like to commend my brethren who asked the questions and the panel's answers. I think your responses have clarified many of the problems which have, I think, been raised without any basis. I commend you and the two previous questioners. I think that has been very helpful to us and thank you very much.

Mr. **Hayes**. I want to commend each of the panelists for what has been excellent testimony and responses to the questions from the committee here. I thank you for coming and I want to say that each of your statements will be entered into the record in toto.

Ms. **Brown**. Thank you, sir.

Mr. **Hayes**. Thank you very much.

We have scheduled to appear before the committee one other witness, who we have been informed has already left his office. So it might be well that we relax for a few minutes and see if he shows.

I would like to inform you at this time, though, that the afternoon session which was scheduled for 1 p.m. has been canceled.

[Whereupon, the joint committees were in recess.]

Mr. **Hayes**. Let's be in order, please. The committee is back in session.

Would the witness for whom we have been waiting please take his seat? [Laughter.]

Mr. **Rauh**. The witness is full of apologies, sir. To begin with, I was told to be here at 11. I'm terribly sorry. Furthermore, I have to make an additional apology, that my statement is en route. [Laughter.]

I guess I have to make a double apology.

Mr. **Hayes**. Just sit down and relax and we'll give you a few minutes.

Mr. **Rauh**. You're the nicest chairman. I want to thank you very much for your tolerance of our problems, sir. Shall I begin?

Mr. **Hayes**. Witness Joseph Rauh will begin his testimony. Go ahead.

STATEMENT OF JOSEPH RAUH, JR., COUNSEL, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. **Rauh**. Thank you, sir. My name is Joseph L. Rauh, Jr. I am counsel for the Leadership Conference on Civil Rights and I appreciate the opportunity to testify this morning.

The Leadership Conference is an organization of some 160 civil rights, women, religious, labor, senior citizens, handicapped, civic, and other organizations. We are united in our belief—remember, sir, if you can get 160 organizations to agree on something, it must be a pretty simple proposition—that the enactment of H.R. 5490, the Civil Rights Act of 1984, is a necessary prerequisite to further civil rights advancement in our country.

The Leadership Conference does not believe that H.R. 5490 is a controversial measure or that those genuinely devoted to the enforcement of civil rights in America will oppose this measure. We ask for the quickest possible action to make this bill the law of the land. The 20th anniversary of the Civil Rights Act of 1964 calls for the prompt enactment of this bill in the interest of continuing progress toward a fair and equitable society.

Passage of H.R. 5490 is vital to restore the effectiveness of the enforcement mechanisms of our most important antidiscrimination laws applicable to federally funded institutions—title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

Mr. Chairman, I go back a long ways. I go back to the 1964 law. I had the honor and privilege of working with Clarence Mitchell, our late beloved Clarence Mitchell, as the lobbyist for the 1964 law. The heart of that law, sir, was title VI. It was already clear by the time we got to the 1964 law that it was unconstitutional to spend moneys from the Federal Government on programs in which blacks were excluded. The Constitution was already clear on that point. Indeed, in *Cooper* v. *Aaron*, which is the old Little Rock case, the Supreme Court back in 1958, I guess it was, announced that no State funds or property could go to any segregated operation.

But what title VI did was to make a mechanism for enforcing that, because although you could have gone to court—in fact, I had gone to court before 1964 on occasion, arguing that you had to integrate something because it had Federal funds—although you could go to court, even before 1964, there was no mechanism. The great thing about this was that it created a mechanism that would work, a mechanism for forcing people to live up to the Constitution. You had a Constitution; you had a clear ruling; but you didn't have any mechanism for enforcing it. What title VI did was it broke the back of school segregation. It's not all broken yet, but it was a great step forward by virtue of getting a wholesale remedy for the violations of the Constitution were State funds, Federal funds—it's the same principle—were being used in things from which part of the payor public, namely, blacks, were excluded. So I have a particular feeling of—almost a proprietary feeling—toward title VI.

That is why I was saddened by what happened—and I will go on with my statement—that enactment of this legislation will repair the damage done to civil rights enforcement by the divided ruling of the Supreme Court in *Grove City College* v. *Bell* and reiterate the previous intentions of Congress and Democratic and Republican administrations alike concerning appropriate implementation of these laws.

As I said, title VI was part of the omnibus Civil Rights Act of 1964. Its purpose was to reinforce by statute the fifth and fourteenth amendment obligations. It was the 5th amendment on the Federal Government, and the 14th on the States, to ensure that federally assisted programs and activities are nondiscriminatory.

Despite this obligation, prior to 1964, the Federal Government virtually ignored segregation and discriminatory practices by recipients of Federal funds. Any relief depended on the expensive and lengthy Federal court process, which I mentioned earlier. The enormous burden on private plaintiffs meant that progress was extremely slow in areas of blatant discrimination such as segregated hospital wings and segregated schools which continued to exist in spite of the decision in *Brown* v. *Board of Education* 10 years earlier.

The enactment of title VI was intended to end any Federal support of institutions engaged in discriminatory activities on the basis of race, color, or national origin. Its potential as a tool to fight school segregation was realized almost immediately following passage of the Elementary and Secondary Education Act of 1965 which poured substantial funds into school systems educating large numbers of educationally disadvantaged children from low-income families. Much of this money went to Southern schools, and the Johnson administration—that was the administration that took over the enforcement of the 1964 law—was committed to action to assure that these Federal funds did not encourage or maintain segregated schools.

Federal action brought results. By 1970, the Department of Health, Education and Welfare, which then enforced title VI—now it's the Department of Education, largely to the extent they enforce it, which isn't very much—had begun enforcement proceedings against approximately 600 school districts for failure to develop and implement desegregation plans. HEW cut off the Federal funds to over 190 districts. More importantly, in almost every instance where funds were cutoff, compliance occurred promptly and the funding was restored.

There is always a point that has got to be made in this. People come up to me and say, "You believe in cutting off funds? You don't want those poor kids to have the funds?" Well, the answer is, "No, of course I want those poor kids to have the funds, but they ought to have the funds in an integrated institution." What cutting off the funds did was not cut off the funds. It was to integrate the institution.

There aren't very many people who cut off their noses to spite their face and continue the segregation once there has been a cutoff of funds. They come into compliance. This is the greatest weapon for compliance that there is, and the Johnson administration really proved it.

The late 1960's was also a time of vigorous Federal court activity on desegregation by both the NAACP legal defense fund and the Department of Justice. As a result, in the 11 Southern States, the percentage of black students in majority white schools jumped from 1 percent in 1964—that's 1 percent 10 years after *Brown*—to 39 percent in the 1970–71 school year. It shows you what that cutoff as a remedy can do.

Although Federal court prodding of HEW and its Department of Education has been necessary in the 1970's and 1980's, the enforcement of title VI, title IX, section 504, and the Age Discrimination Act have been critical tools in the continuing struggle against discrimination. Yet never during these many years of the fight against segregation did Government enforcers, or even local resisters, consider the scope of title VI in any way limited to less than institution-wide coverage. The process of tracing Federal funds into each school or classroom which was segregated would have so bogged down the HEW enforcement program as to render it virtually useless. In 1964, Congress was searching for an effective enforcement mechanism, not a meaningless administrative tangle. The enforcement mechanism they chose worked.

While the *Grove City College* case addressed the extent of title IX coverage, its implications are dire for title VI, section 504, and the Age Discrimination Act as well. The Court held that a college which receives Federal funding only in the form of student financial aid is required to comply with title IX only in its student financial aid program. The college can discriminate on the basis of sex anywhere else in the institution without violating title IX. If Congress fails to act, and if the *Grove City College* case is allowed to stand, there is no longer any Federal law which comprehensively prohibits sex discrimination in education.

Title IX, like section 504 and the Age Discrimination Act, was modeled after title VI. If the reasoning of the *Grove City College* case were applied to title VI, a college which accepted only student financial aid could discriminate against black and Hispanic students in its academic programs.

While the 14th amendment would provide a potential vehicle for the relief of these students, the absence of an equal rights amendment might preclude such relief for female victims of discrimination. In any event, the relegation of minority, female, handicapped and older victims of discrimination to the courts alone is directly contrary to the purpose of the statutes barring discrimination by Federal aid recipients.

In other words, what *Grove City College* does is take the remedy that is the most valuable, workable, and historically proven and, in lieu of that, puts in a remedy that has really failed the ultimate solution of this problem.

Congress never intended any such result. Indeed, title IX, section 504, and the Age Discrimination Act were intended to provide, as a said before, wholesale, broad, comprehensive relief by the executive agencies because of the insufficiency of the case by case judicial retail approach. In my judgment, and that of many colleagues and associates of both political parties, *Grove City* vitiates the effectiveness of those antidiscrimination laws and wholly undermines what Congress sought to achieve.

I urge the two committees to adopt H.R. 5490 as proposed and without amendments. Bring this to the floor as fast as possible. Because the affected statutes have at times been vigorously enforced, this country has witnessed great progress in opening opportunities for those to whom they were previously denied. But the job is not yet done and will not be completed unless the enforcement tools of the past are returned to the Federal Government. Let us get on with the job of enacting H.R. 5490 in the spirit of those who gave us the first great civil rights law 20 years ago.

I have just one or two additional comments, sir, that I would like to make at this point.

We need uniformity in those four statutes. The Constitution might create differences in the sense that the blacks' rights have been declared more clearly than the rights of the Hispanics, which are based on foreign nationality, foreign origin, and the rights of women which have been declared under the 14th amendment only to a more limited extent, the rights of older people have generally not been dealt with, the handicapped, have not been dealt with under the Constitution.

But what is the genius of these four statutes is that they bring a uniformity of Federal withdrawal of funds so that all of those four groups are treated fairly, as they ought to be. It's the real genius of the Congress that has made this possible.

It's true, it started with the blacks in title VI, but the three other laws dealing with it are of equal importance to making a fair society. We were helped in starting it by virtue of the fact that the blacks had the clearest constitutional right in this area and title VI was easier to get because it was the enforcement of a constitutional right. But it showed the way for the whole idea that Federal funds are not going to be used where they discriminate against blacks, women, Hispanics, older folks, or handicapped, and that is the way it ought to be.

Finally, like Gertrude Stein said, "Discrimination is discrimination is discrimination." If a person discriminates in one place, I don't trust him too much about not discriminating somewhere else.

I think discriminators are clever. They say, "I'm only going to take money for this thing" and then they behave. But if they really at heart are discriminators, they're liable to show up somewhere else. I think title VI and the three modeled after it are great tributes to this country and what we have done. I hated to see the *Grove City* split decision do this. Congress has every right and need and, indeed, obligation to put these simple changes into the law so we can go back to enforcing all of those four statutes.

Thank you very much. Again, my apologies on the delay.

Mr. HAYES. Let me just say to the witness that your testimony here this morning will be entered into the record in its entirety. It has been a continuation of excellent testimony which we have benefited by this morning.

I just want you to know personally that I regard you as being a pioneer in the struggle for civil and equal rights and I have a lot of respect for your positions and opinions based on your track record in this arena. I want to thank you for coming and sharing your views with us in respect to support for the particular bill that is before us, H.R. 5490, and I do hope we're successful in attaining its passage in this session of the Congress.

Thank you very much.

Mr. RAUH. Thank you, sir.

Mr. HAYES. This concludes this morning's hearing. We will recess until 9 a.m. tomorrow morning.

[Whereupon, at 10:30 a.m., the subcommittees adjourned.]

CIVIL RIGHTS ACT OF 1984

THURSDAY, MAY 17, 1984

House of Representatives,
Committee on Education and Labor, and
Committee on the Judiciary,
Subcommittee on Civil and Constitutional Rights,
Washington, DC.

The committees met, pursuant to call, at 9:12 a.m., in room 2175, Rayburn House Office Building, Hon. Carl D. Perkins (chairman of the full Committee on Education and Labor) and Hon. Don Edwards (chairman of the Judiciary Subcommittee on Civil and Constitutional Rights) presiding.

Members present, Committee on Education and Labor: Representatives Perkins, Simon, Burton, Hayes, Erlenborn, and Nielson.

Members present, Committee on the Judiciary: Representatives Edwards and Sensenbrenner.

Staff present: John F. Jennings, majority counsel, Education and Labor; Ivy L. Davis, assistant counsel, Committee on the Judiciary; Electra Beahler, minority counsel, Education and Labor; and Bud Blakey, staff director, Subcommittee on Postsecondary Education.

Chairman Perkins. Do we have witnesses here this morning?

Father Byron. Yes, Mr. Chairman.

Chairman Perkins. Father William Byron. Today the Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary are continuing hearings on H.R. 5490. This bill affirms the broad coverage of the major Federal antidiscrimination laws and is needed because of the recent Supreme Court decision in *Grove City College* v. *Bell*, limiting the coverage of title IX.

Our first witness, Father William Byron, president, Catholic University of America, on behalf of the American Council on Education, and the Honorable John Buchanan, and Mary Frances Berry, Commissioner of the U.S. Commission on Civil Rights, constitutes your first panel.

Come on up here.

Mr. Simon. Mr. Chairman.

Chairman Perkins. Excuse me. Go ahead, Mr. Simon.

Mr. Simon. Unfortunately, because of a conflict, I am not going to be able to stay very long. I simply wanted to welcome all three witnesses, who are old friends, Father Byron who I knew before he ascended the heights and became president of Catholic University, and John Buchanan, with whom you and I served together, and Mary Frances Berry, who I have watched stand up for the cause of what is good and right not only in her present position, but in previous positions, and I wish I could be here to hear the full testimony of all three.

I do want to note, and I want to enter a full statement in the record, that the Chairman of the Civil Rights Commission was scheduled to appear and I am disappointed that he is not able to be here. We're pleased to have Commissioner Berry here. It seems to me that this is a subject of significant enough import to the work of the Civil Rights Commission that clearly he ought to present his testimony in behalf of the Commission.

What we know from the *Brown* case is that it is not enough to have a court decision. What you need is some sanction in the law to protect people. And we, at least many of us, are concerned about the court decision that we think goes contrary to the intent of Congress, and weakens that implementation.

My hope is that the Chairman of the Civil Rights Commission will testify, but in any event, we have to move ahead and we're not going to slow down what we're doing because he is not here.

[Opening statement of Congressman Paul Simon follows:]

OPENING STATEMENT OF HON. PAUL SIMON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Today the Committee on Education and Labor and the Judiciary Subcommittee on Civil and Constitutional Rights continue their joint hearings on H.R. 5490, The Civil Rights Act of 1984. This legislation, which now enjoys the support of 138 of my colleagues in the House, is the single-most important civil rights legislation to come before the Congress since the late 1960's. As my friend Joe Rauh told the Committee yesterday, the job of enforcing civil rights is not yet done, and although great progress has been achieved, we must ensure that the proper enforcement tools remain available to complete the work before us.

As we mark the Thirtieth Anniversary of the *Brown* decision, it is appropriate that the Congress recommit itself to the cause of equality by enacting H.R. 5490.

Yesterday the Committee was to hear from the U.S. Commission on Civil Rights on the pending legislation. The Chairman and all of the Commission members were invited to present their views. The Committee staff had been advised that Chairman Pendleton and Commissioner Berry had agreed to appear on behalf of the Commission. We learned only yesterday morning—and not from the Commission staff directly—that Chairman Pendleton did not intend to appear. The staff then sought to re-arrange our hearing schedule to facilitate the appearance and the personal testimony of Chairman Pendleton or another member of the Commission along with Dr. Berry. Chairman Edwards, Mr. Sensenbrenner and I all share the view that this legislation is of such significance that the commissioners, who make policy for the Commission on Civil Rights, should appear personally and present the Commission's views.

We all stand ready now and in the remaining days of our hearings before both Committee's begin marking up H.R. 5490, to receive the testimony of Chairman Pendleton or other members of the Commission. I am pleased to see that Dr. Berry is here and prepared to contribute again to the deliberations of the Education and Labor Committee as she has so often in the past.

I want to express my disappointment that the Chairman has seen fit not to appear and to testify on this important civil rights legislation. Although I understand that he was in California yesterday to attend the board meeting of a lending institution. I hope that he will reconsider his decision not to appear and find the time to come before the Committee.

Chairman **PERKINS**. Let me congratulate all of the three distinguished witnesses that constitute this panel. I have known most of these distinguished witnesses for quite a period of time, and we are delighted to welcome you here and I think everybody appreciates all three of you. You've already made your record. And at this time I'm going to call on Father William Byron. Go ahead, Father Byron.

[Prepared statement of Rev. William J. Byron, S.J., follows:]

PREPARED STATEMENT OF REV. WILLIAM J. BYRON, S.J., PRESIDENT, THE CATHOLIC UNIVERSITY OF AMERICA; ON BEHALF OF AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES, AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES, ASSOCIATION OF URBAN UNIVERSITIES, NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION, NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS, AND NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES

I am William Byron, President of The Catholic University of America. I appear before you today, on behalf of the American Council on Education, an organization representing over 1,700 colleges, universities and organizations in higher education and the associations listed on the cover sheet on this statement. I wish to indicate our support of H.R. 5490, the Civil Rights Act of 1984, which will clarify the application of Title IX, the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and the Title VI of the Civil Rights Act of 1964.

The four statutes that will be amended by this proposed legislation have provided an important mechanism for eliminating various forms of discrimination relating to educational and employment opportunity. Since the enactment of those laws and the promulgation of the applicable regulations, substantial progress has been made in reducing all forms of bias in our colleges thus contributing to the initial legislative purpose of eliminating discrimination throughout the American educational system.

It is our position that passage of this legislation is warranted at this time to ensure that educational rights are protected to the fullest extent and to signify rededication to the goals of existing civil rights statutes. We hope that the legislative history will make it clear that this proposed legislation is neither intended to affect current exemptions for religiously-affiliated and single-sex institutions contained in the four statutes to be amended, nor is it intended to affect the tax-exempt status of any institution of higher education.

Until the *Grove City* decision, there was a prevailing understanding that the receipt of federal funds by an institution covered all programs and activities at a college or university. The failure to enact this legislation would encumber the enforcement process and disrupt educational administrative functions by causing federal officials to attempt to trace federal funds in all school activities.

We do, however, have some concerns relating to the enforcement process that has developed in civil rights programs during the course of the past decade. College and university administrators have been particularly concerned with the lack of procedural fairness in the enforcement process. We feel that the legislative history should note the concerns of both the protected groups and institutions with the need to establish the necessary elements of procedural due process.

Initially, we feel a need for an articulated destortion of the presumption that institutions are deemed innocent until proven guilty. Unfortunately, enforcement personnel have in numerous instances departed from that presumption in the conduct of their investigations. As an added safeguard against possible harassment and in order to assure equitable treatment, we would request that no funds be terminated until there is a final judicial determination as to whether a discriminatory act has occurred.

Moreover, administrative regularity mandates the publication of a field enforcement handbook for all statutes to ensure to the extent possible that all regional offices are enforcing the law in the same manner. Over the years, it has been a constant irritant to administrators, as well as protected groups, to have conduct and remedial plans acceptable in one region of the country while being rejected in another. Similarly to further ensure uniform enforcement we would suggest that a system should be devised whereby all questions of first impression are forwarded to Washington for determination.

We, once again, reassert our willingness to train enforcement personnel so that they might better understand the unique ways that colleges and universities function. Institutions of higher education are not asking for an exemption from the laws covering society as a whole, but are requesting that they be accorded even handed and appropriate treatment in any complaint investigation.

College and universities support the spirit and letter of all of the laws affected by H.R. 5490 and repledge their efforts toward fulfillment of their goals. I will be pleased to answer any questions you may have regarding my statement.

STATEMENT OF FATHER WILLIAM BYRON, PRESIDENT, CATHOLIC UNIVERSITY OF AMERICA, ON BEHALF OF THE AMERICAN COUNCIL ON EDUCATION

Father Byron. Thank you, Mr. Chairman. As you know, my name is William Byron. I serve as president of the Catholic University of America, and I appear before you today on behalf of the American Council on Education, an organization representing over 1,700 colleges, universities, and organizations in higher education.

I also appear on behalf of the associations listed on the cover sheet of this statement.

I wish to indicate our support of H.R. 5490, the Civil Rights Act of 1984, which will clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

The four statutes that will be amended by this proposed legislation have provided an important mechanism for eliminating various forms of discrimination relating to educational and employment opportunity. Since the enactment of those laws and the promulgation of the applicable regulations, substantial progress has been made in reducing all forms of bias in our colleges, thus contributing to the initial legislative purpose of eliminating discrimination throughout the American educational system.

It's our position that passage of this legislation is warranted at this time to ensure that educational rights are protected to the fullest extent, and to signify rededication to the goals of existing civil rights statutes. We hope that the legislative history will make it clear that this proposed legislation is neither intended to affect current exemptions for religiously affiliated and single sex institutions, contained in the four statutes to be amended. Nor is it intended to affect the tax exempt status of any institution of higher education.

Until the *Grove City* decision there was a prevailing understanding that the receipt of Federal funds by an institution covered all programs and activities at a college or university. The failure to enact this legislation would encumber the enforcement process and disrupt educational administrative functions by causing Federal officials to attempt to trace Federal funds in all school activities.

We do, however, have some concerns relating to the enforcement process that has developed in civil rights programs during the course of the past decade. College and university administrators have been particularly concerned with the lack of procedural fairness in the enforcement process. We feel that the legislative history should note the concerns of both the protected groups and the institutions' with the need to establish the necessary elements of procedural due process.

Initially, we feel a need for an articulated restoration of the presumption that institutions are deemed innocent until proven guilty. Unfortunately, enforcement personnel have, in numerous instances, departed from that presumption in the conduct of their investigations.

As an added safeguard against possible harassment and in order to ensure equitable treatment, we would request that no funds be terminated until there is a final judicial determination as to whether a discriminatory act has occurred. Moreover, administrative regularity mandates the publication of a field enforcement handbook for all statutes, to ensure to the extent possible that all regional offices are enforcing the law in the same manner.

Over the years it's been a constant irritant to administrators, as well as to the protected groups to have conduct and remedial plans acceptable in one region of the country, while being rejected in the other.

Similarly, to further ensure uniform enforcement, we would suggest that a system should be devised whereby all questions of first impression are forwarded to Washington for a determination. We, once again, reassert our willingness to train enforcement personnel so that they might better understand the unique ways that colleges and universities function. Institutions of higher education are not asking for an exemption from the laws covering society as a whole, but are requesting that they be accorded even and appropriate treatment in any complaint investigation.

Colleges and universities support the spirit and letter of all of the laws affected by H.R. 5490, and repledge their efforts toward fulfillment of their goals. I'll be pleased to answer any questions you might have, Mr. Chairman, about this testimony.

Chairman PERKINS. Thank you. We'll hear from the other witnesses. We'll hear from you now before we interrogate you, Ms. Berry. Go right ahead.

[Prepared statement of Mary Frances Berry follows:]

PREPARED STATEMENT OF MARY FRANCES BERRY, MEMBER, U.S. COMMISSION ON CIVIL RIGHTS

I am pleased to respond to your request for testimony concerning H.R. 5490, the Civil Rights Act of 1984. The views I am expressing are shared by my colleague, Blandina Cardenas Ramirez, who could not be here today.

My testimony is based on numerous Commission studies monitoring the enforcement of the civil rights statutes and the need for their continued enforcement to provide real equal opportunity in our society without discrimination. It is based also on my experiences as Assistant Secretary for Education in the Carter Administration, Chancellor at the University of Colorado, Provost at the University of Maryland, and Director of the Higher Education Division of the Office for Civil Rights in the Department of Health, Education, and Welfare in the Nixon Administration. It is founded also on extended exchanges of letters by the Commission with Assistant Attorney General William Bradford Reynolds and Education Secretary Terrell Bell concerning the *Grove City* case and Title IX enforcement.

When I came before these Committees on May 18, 1983, I expressed the Commission's fears that the Justice Department would fail to support the validity of existing regulations under Title IX of the Education Amendments of 1972 in the *Grove City* case. Our worse fears were realized: the Department did not present supporting arguments to the Supreme Court, and no Special Counsel was appointed as happened in the tax exemption case earlier. Thereafter, the Court handed down a decision which essentially states that a college may not discriminate in its "financial aid program" because it is covered by Title IX, but the college can discriminate in academic departments, admissions, and other functions without any risk of losing federal taxpayer funds. Fortunately, H.R. 5490 would re-establish the bipartisan and longstanding interpretation of civil rights protections available under Title IX. The major civil rights laws such as Title IX, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 form a seamless web and are all patterned after Title VI of the Civil Rights Act of 1964. Therefore, H.R. 5490 would adjust the language of those statutes to remove the threat that they would be subjected to similar narrow interpretations in violation of the intention of a bipartisan majority in Congress and contrary to interpretations followed by successive administrations of both parties.

Since Grove City was decided, the Office for Civil Rights [OCR] in the Department of Education has had its already weak enforcement efforts retarded. The Office must spend additional time trying to trace funds to determine jurisdiction before any investigation of complaints can be undertaken. The Federal Assistance Award Data System was organized in FY 1983 to serve as a central source of data for government agencies and departments. It identifies only those recipients of direct federal funding and often does not identify the particular program receiving the funds within the institution. Under existing regulations, no additional information was ever required before OCR could act, and therefore no one ever collected or provided it. In addition, funds distributed through block grants are not traceable directly to local agencies; they receive the funds from the States. This information also is not needed so long as the law and regulations make the State responsible for what it receives as they clearly did before Grove City.

Since Grove City was decided, under Title IX at least 23 education complaints involving large institutions have been closed because it was not clear whether the alleged discrimination occurred in activities funded directly by the Federal government. They have been in the areas of admissions, student services, and student support services. In six instances, the scope of compliance reviews was narrowed, and eighteen other compliance reviews and five complaint investigations have been interrupted for redefinition. In addition, nine cases involving elementary and secondary institutions and 46 involving postsecondary institutions are under review to determine whether they can proceed in view of the decision.

Since the *Grove City* decision, in OCR-Education under Section 504 five complaint cases and one pending compliance review have been narrowed as a result. Seven cases are being reviewed due to the decision to see if they can go forward. The issue most affected has been program services for disabled people. Title VI has similarly been affected in OCR-Education. One Title VI complaint has been closed, and five complaint investigations have been modified because they involved athletics, admissions program requirements, and employee evaluation/treatment, activities not administered by the student aid office, and it was not clear whether or not they were Federally funded.

The result of this activity, which is only one example in one department, is to permit institutions and school systems to utilize billions of dollars of Federal taxpayer funds without any investigation of complaints concerning limitations on the opportunities of persons seeking equal access to education. Until H.R. 5490 is enacted, we can expect to see the perpetuation of this negative action in the area of civil rights.

Certain health care benefits are also affected because they are administered in a manner similar to Federal student aid. There is also a problem with civil rights investigations in hospitals assisted by Medicare and Medicaid in that they would be limited to the offices that handle those funds. There are additional problems with urban mass transit systems, public housing, parks and recreation, and a host of other Federally-assisted areas.

Before *Grove City* any program or activity that received or benefited from Federal funds was covered by civil rights guarantees. In addition, any unassisted program or activity whose discriminatory practices "infected" an assisted program was also covered. No determination had to be made about whether or not assistance was received before an investigation began. In fact, ascertaining the type of assistance present would be part of the investigation. Although no institution of higher education has ever had its funds terminated for non-compliance with the civil rights laws, the possibility of actual fund termination was limited to the particular program or part thereof in which non-compliance was found. The program or part thereof would be determinated as a matter of fact during the investigation. H.R. 5490 would restore the enforcement authority under Title IX, Title VI, Section 504, and the Age Discrimination Act as it existed before the *Grove City* decision. It would do no more and no less.

Under H.R. 5490, recipients of Federal financial assistance would be prohibited from discriminating. Recipients are defined exactly as they are in existing, longstanding regulations. Fund termination is limited to the particular entity as to which a finding of non-compliance is made, and any assistance which supports directly or indirectly such non-compliance. Some people may wish that all Federal funds could be terminated if non-compliance is found in any activity of a recipient, but that was not the law before *Grove City,* and it is not what is proposed in H.R. 5490. The reason that an entire college or university can have its Pell grant funds terminated is that Pell grants provide aid for the college or university as a whole. That is the intent of Congress, and that is the way, as a practical matter, student aid funds are utilized in colleges and universities.

Under H.R. 5490 recipients of Federal funds would be prohibited from discriminating, and if they were found to be discriminating, the Federal funds utilized to support directly or indirectly their actions, and no others, would be terminated. It should be absolutely incomprehensible that Federal taxpayers' funds should be used in ways to prevent some of the taxpayers because of their age, race, sex, or solely because of a handicapping condition from having an equal opportunity to use what we all finance.

Congress needs urgently to enact H.R. 5490.

I would be pleased to answer any questions you might have.

STATEMENT OF MARY FRANCES BERRY, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS

Ms. BERRY. Thank you very much, Mr. Chairman.

The views I'm expressing today are shared by my colleague, Blandina Cardenas Ramirez, who could not be here today.

The testimony I am going to give today on this 30th anniversary of the *Brown* decision, and here in the 20th year of the Civil Rights Act of 1964, is based on a lot of studies that the Commission on Civil Rights has done, monitoring the enforcement of civil rights statutes. and the need for enforcement.

It's also based on my term as Assistant Secretary for Education of HEW, in which I worked with you, Mr. Perkins, Mr. Jennings, and other people on your staff and other people up here. It's also based on my experience as the chancellor at the University of Colorado at Boulder, and provost at the University of Maryland.

I also had a stint as Director of the Higher Education Division in the Office of Civil Rights, in HEW, during the Nixon administration, of all places, and so my testimony is based on all of that, as well as some letters we've been sending back and forth to the Justice Department and Education Secretary Bell on this subject.

When I came up here to testify before a joint session of the Postsecondary Committee and the Judiciary Committee in May 1983, I expressed fears that we had about what was going to happen with title IX and *Grove City*. We were worried about what the Justice Department would do and we were worried about a new special counsel being appointed, and we had all of these fears about what would happen. Unfortunately, our worst fears were realized, and all the horrible things we expected might happen, did.

But fortunately, though, the Congress has responded quickly and I think you're to be commended on your bipartisan effort, and in particular I want to commend Mr. Sensenbrenner for his leadership in this effort, just as he gave strong leadership in the enactment of the Voting Rights Act. I think it's important to have bipartisan support.

But in any case, all this legislation would do is to remove the threat that all of the major civil rights laws would be subject to those narrow interpretations in *Grove City*, in violation of the intention of a bipartisan majority in Congress.

I want to tell you, Mr. Chairman, that since the case was decided in February the Office for Civil Rights in the Department of Education has had its already weak enforcement efforts retarded. The office has to spend more time trying to trace funds before they can find out whether they can investigate a complaint.

There's a system that we call FAADS for short, which is the Federal Assistance Award Data System, set up in 1983, as a central source for data, and FAADS doesn't tell you exactly where on a campus or in an institution the money goes. It just tells you that the place gets money. And the reason why that is the case is because before *Grove City* nobody had to identify exactly where the money was before you could engage in investigation. OCR still has the FAADS capability but that's all it got.

Since *Grove City* was decided in February, under title IX, 23 education complaints involving large institutions have been closed by the Department, because they couldn't figure out whether the activities were in some program that was funded directly by the Federal Government. These were cases that earlier were proceeding without any trouble. They have been in admissions, in student services, and in student support services.

There have been 6 places where they have narrowed the scope of compliance reviews and 18 other cases where compliance reviews, and 5 complaint investigations have been interrupted. In addition, there are 9 cases involving public schools and 46 involving colleges and universities that are being reviewed to see whether they can proceed.

It's not only title IX that's been affected, Mr. Chairman. Section 504 has been negatively affected since February. Five complaint cases and one pending compliance review have been narrowed as a result, and there are seven more cases that they're over there reviewing, trying to figure out what to do with them.

Most of these cases involve program services for disabled people, once they are on a campus. The same thing has happened to title VI. One complaint has been closed as a result of *Grove City*, and they were proceeding with it before, and five have been modified because they couldn't tell whether, in fact, they met the requirements of the *Grove City* case.

The result of this activity, which is in only one department in the Government, just one department, is to permit institutions and school systems to utilize billions of dollars of Federal taxpayer funds without any investigation of complaints concerning limiting the opportunities of people who are trying to get equal access to education. And until H.R. 5490 is enacted, we can expect this kind of thing happening all over the place.

It's probably worse now, because my data only goes up to April 18, and we're now in May, of course.

Before *Grove City*, if a program or activity received or benefited from Federal funds, it was covered. Also, any unassisted program or activity whose practices affected an assisted program, was also covered. What this bill would do, for title IX, for 504, title VI, and the Age Discrimination Act, is to put us back where we were before *Grove City*. It would do no more and it would do no less. In H.R. 5490, recipients would be prohibited from discriminating and recipients are defined as they are in the existing, longstanding regulations, which have withstood scrutiny by the Congress and by the courts for all of this time.

Under H.R. 5490, recipients would be told they could not discriminate, and if they were found discriminating, the funds they were using to support directly or indirectly their actions, and no other funds, would be terminated.

Now, there might be some people who would wish that all the funds would be terminated if they were found to be discriminating in some activity. But that wasn't the law before *Grove City* and that isn't the law that is being proposed by this legislation.

I believe that it should be absolutely incomprehensible that taxpayer funds should be used in ways to prevent some of the people, because of their age, race, or sex, or solely because of a handicapping condition, from having an equal opportunity to use what we all pay for. I believe Congress needs urgently to enact this legislation without any amendments or even debate about whether there ought to be amendments to range all over the terrain of the law, and I would be pleased to answer any questions you might have, Mr. Chairman.

Chairman PERKINS. In just a few moments we'll get to you. We want to hear now from our former colleague from Alabama, Mr. Buchanan. Go right ahead.

[Prepared statement of John Buchanan follows:]

PREPARED STATEMENT OF JOHN BUCHANAN, CHAIRMAN, PEOPLE FOR THE AMERICAN WAY

Messrs. Chairmen and members of the committees: I am pleased to have this opportunity to testify in favor of HR 5490, the Civil Rights Act of 1984.

My name is John Buchanan. I was a Republican Member of Congress for eight terms, from 1965 through 1981. I was a member of the Education and Labor Committee, which has jurisdiction over Title IX of the Education Amendments of 1972, from 1975 to 1981.

I am also Chairman of People for the American Way (a civil rights and civil liberties organization) and a member of the Board of Directors of The Equality Center (a nonprofit organization to advance human and civil rights).

People for the American Way is an organization devoted to the preservation of First Amendment liberties. Unless all persons, regardless of race, sex, age or disability, are guaranteed equality of education and other opportunities, our cherished First Amendment freedoms are meaningless. This is a cost we cannot afford to bear as a free society.

My testimony today focuses on Title IX of the Education Amendments of 1972, which prohibits sex discrimination in education. However, I wish to express my support for the strong and uniform prohibitions of discrimination on other bases—race, national origin, age and handicap—that are also contained in this bill. Equal educational opportunity is a fundamental right in a democracy, as well as a prerequisite to full participation in our society. Passage of the Civil Rights Act of 1984 is essential if we are to continue to strengthen our country by guaranteeing our citizens an education free from discrimination. Without this bill, overt exclusion of young women from educational opportunities, including the graduate and professional programs that prepare women for the workplace, could again become commonplace.

Without this bill, the shameful discrimination against minority group members and the disabled that was once commonplace in our country could re-emerge.

The United States Supreme Court spoke eloquently of this concern in the 1954 landmark case, *Brown* v. *Board of Education of Topeka*, regarding racial discrimination in schools:

> Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument for awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

These words are just as true today as they were thirty years ago. And they are just as true for female students, handicapped students, and older students, as they are for minority students.

It is especially significant that Congress is considering this legislation at the same time that there is a movement across the country to foster excellence in education.

Excellence is not important only for those of us who are white, male, English-speaking, able-bodied, and not old. The opportunity for excellence should also be available to those who are nonwhite, female, limited-English speaking, disabled and older. Passage of the Civil Rights Act of 1984 will go a long way to help assure that these opportunities continue to exist and grow.

LEGISLATIVE INTENT OF TITLE IX

I was a member of Congress when Title IX was enacted in 1972 and when the Title IX regulation was examined in detail by the Congress in 1975. When I voted on these measures, it was my clear understanding that Title IX provided broad institution-wide protections from sex discrimination against students and employees by schools and colleges. I was quite certain that Title IX was a comprehensive approach to the pervasive and often entrenched problems of sex discrimination in our schools and colleges. It was not my understanding that the law was a piecemeal solution, forbidding sex discrimination in one classroom, while allowing it in the next one. On the floor of the House, Representative Edith Green [the main House sponsor of the bill and the chairman of the Postsecondary Education Subcommittee] explained this institution-wide coverage, saying: "The purpose of [Title IX] is to end discrimination in all institutions of higher education, yes, across the board. . . . [117 Congressional Record, November 4, 1971, p. 39256]"

While I was in Congress, there were numerous efforts to amend Title IX. These amendments uniformly showed that Congress viewed the Title IX coverage as broad and institution-wide. Proposed amendments would have excluded or limited coverage in athletics, physical education and choirs, and reduced the overall scope of the statute. These amendments were never enacted into law.

The fact that my colleagues introduced these amendments demonstrates their understanding of Title IX's board institution-wide coverage. This understanding paralleled my own. If members have viewed Title IX's scope of coverage as narrowly as the Supreme Court's *Grove City* decision, they would not have felt the need to introduce amendments to exclude these areas—areas which almost never receive direct Federal financial assistance. In my considered judgment, it was clear that these areas were covered by Title IX unless there was a specific statutory exclusion.

INTERCOLLEGIATE ATHLETICS

One of the amendments to Title IX that did pass specifically clarified that intercollegiate athletic programs were covered by Title IX. In 1974 and 1975 Senator Tower sought to exclude "revenue producing" intercollegiate athletic activities from Title IX. Rather than agreeing to this exemption, the Congress passed the "Javits Amendment," specifically requiring HEW to include athletics in the Title IX regulation. This amendment specified:

"The Secretary [of HEW] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendment of 1972 relating to the prohibition of sex discrimination in Federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports."

HEW did indeed publish Title IX regulations covering athletic programs in 1975. The results of this regulation have soundly disproven the dire prophecies of Title IX detractors who predicted that Title IX would mean the death of college football. College football programs thrive. And, while women's athletic programs have grown, men's programs have almost always grown even more in terms of number of participants and dollars.

Nor has enforcement by the Office for Civil Rights led to the predicted disasterous results on colleges and their sports programs. OCR has investigated over 100 complaints of sex discrimination in college athletic programs. And, while they have found sex discrimination in the vast majority of instances, no school has lost its Federal funding.

I am pleased that there has been dramatic progress in school and college athletic opportunities for girls and women since Title IX was enacted. For example:

The number of girls in interscholastic athletics grew by over 600 percent between 1971 and 1978. Today, about 35 percent of the 5.1 million high school athletes are girls.

Women's participation in intercollegiate athletics more than doubled between 1971 and 1976. In 1981-82, about 30 percent of all intercollegiate athletes were women.

College women received less than 1 percent of athletic scholarship money in 1972; in 1980, they received about 21 percent.

We should view this progress as a starting point. There is still much to be done before the female athlete has the same quality of opportunity as the male athlete. For example:

Twice as many boys as girls had participated in varsity sports among 1980 high school seniors.

Minority women are dramatically underrepresented in college athletic programs. In 1978, 12 percent of college students were black, but less than 8 percent of the women athletes were black.

Almost half of all college women's athletic teams are coached by men; almost no men's teams are coached by women.

This second set of figures shows the continuing need for the strong athletic incentive that Title IX has provided. While many colleges would have undoubtedly made some progress in this area without Title IX, both the number of colleges making progress and the degree of progress would have been far, far smaller if Title IX had not been on the books.

Already, as a result of the *Grove City* decision, the Office for Civil Rights has begun to tell colleges that, because of the nature of their federal funding, sex discrimination in their athletic programs does not violate Title IX. For example, OCR has given this message in the last two months to such diverse colleges as the University of Maryland at College Park, Centralia College in Seattle (Washington), and Idaho State University. We will be turning back the clock on intercollegiate athletic opportunities for our daughters if we fail to enact this legislation.

CONGRESSIONAL REVIEW OF THE TITLE IX REGULATION

In 1975 Congress reviewed the Title IX regulation under a provision in the General Education Provisions (Section 431(d)) which specified that the Congress could, by concurrent resolution, reject any education regulation or other rule which was not consistent with the enacting legislation. At this time I was a member of both House Subcommittees which held hearings on the Title IX regulation—the Subcommittee on Postsecondary Education and the Subcommittee on Equal Opportunities. In all, we held seven days of hearings and listened to every point of view.

When HEW Secretary Caspar Weinberger testified before the Subcommittee on Postsecondary Education, he made clear that the coverage of Title IX and its regulation were extensive. He said:

"The regulation, briefly, provides as follows: Except for certain limited exemptions [specifically excluded by the Congress], the final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives Federal funds for any of those programs. If the Congress wished to exclude athletics, for example, as so many people seem to wish, Congress could easily have said so. However, Congress in a 1974 amendment, the so-called Javits amendment, at section 844 of the Education Amendments of 1974, made very clear that athletics should be covered by the regulation. . . ." [Sex Discrimination Regulations, Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, House of Representatives, June 26, 1975, page 438]

Secretary Weinberger then proceeded to outline in detail Title IX coverage of specific areas, admissions, physical education, athletics and employment—all areas in which direct Federal funding is rare.

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In conclusion, the importance of swift passage of the Civil Rights Act of 1984 cannot be over-emphasized. This is an issue of basic human decency and fairness. It is an issue where Republicans and Democrats alike need to reaffirm their commitment to eliminate the barriers to equal opportunity that have no place in a democratic and free society.

This bill does not break new ground. It is the same ground that my Congressional predecessors walked in 1964 when they passed the Civil Rights Act. It is the same ground that I and my colleagues walked in 1972 when we passed Title IX, in 1973 when we passed Section 504 of the Rehabilitation Act, and in 1975 when we reviewed the Title IX regulation and passed the Age Discrimination Act. I urge you now to reaffirm original Congressional intent by enacting the Civil Rights Act of 1984 in this Congress.

STATEMENT OF HON. JOHN BUCHANAN, FORMER MEMBER OF CONGRESS [R-AL], CHAIRMAN, PEOPLE FOR THE AMERICAN WAY

Mr. BUCHANAN. Thank you, Mr. Chairman. I would ask that my full statement be included in the record.

Chairman PERKINS. Without objection, it will be included in the record.

Mr. BUCHANAN. I will summarize it.

Mr. Chairman, I am pleased to have this opportunity to testify in favor of H.R. 5490, the Civil Rights Act of 1984. My name is John Buchanan. I was a Republican Member of the Congress for eight terms, from 1965 to 1981, and a member of your Education and Labor Committee, as you know. I am at present, Mr. Chairman, chairman of the board of People for the American Way, and a member of the board of directors of the Equality Center. In urging the passage of this legislation, I speak for those entities as well.

People for the American Way is an organization devoted to the preservation of first amendment liberties. Unless all persons, regardless of race, sex, age or disability, are guaranteed equality of education and other opportunities, our cherished first amendment freedoms are meaningless. This is a cost we cannot afford to bear as a free society.

My testimony today focuses on title IX of the Education Amendments of 1972, which prohibit sex discrimination in education. However, I wish to express my support for the strong and uniform prohibitions of discrimination on other bases: race, national origin, age, and handicap, that are also contained in this bill.

Equal educational opportunity is a fundamental right in our democracy, as well as a prerequisite to full participation in our society. Passage of the Civil Rights Act of 1984 is essential if we are to continue to strengthen our country by guaranteeing our citizens an education free from discrimination. Without this bill, overt exclusion of young women from educational opportunities, including the graduate and professional programs that prepare women for the workplace, could again become commonplace. Without this bill, the shameful discrimination against minority group members and the disabled that was once commonplace in our country could reemerge.

The U.S. Supreme Court spoke eloquently of this concern in the 1954 landmark case, *Brown* v. *Board of Education of Topeka*, regarding racial discrimination in the schools, and I quote:

> Today education is perhaps the most important function of state and local governments. It is the very foundation of good citizenship. Today it is a principal instrument for awakening the child to cultural values and preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

These words are just as true today as they were 30 years ago. And they are just as true for female students, handicapped students, and older students as they are for minority students.

It is especially significant that Congress is considering this legislation at the same time there is a movement across the country to foster excellence in education; it is not only important to those of us who are white, male, English-speaking, able bodied, and not old. The opportunity for excellence should also be available to those who are nonwhite, female, limited English-speaking, disabled, and older.

Passage of the Civil Rights Act of 1984 will go a long way to help assure that these opportunities continue to exist and to grow.

I was a Member of Congress when title IX was enacted in 1972, and when the title IX regulation was examined in detail by the Congress in 1975. When I voted on these measures, it was my clear understanding that title IX provided broad institutionwide protections from sex discrimination against students and employees by schools and colleges. It was not my understanding that the law was a piecemeal solution, forbidding sex discrimination in one classroom while allowing it in the next.

On the floor of the House, Congresswoman Edith Green, who was the main House sponsor of the bill, as you will recall, explained this institutionwide coverage in the following words: "The purpose of title IX is to end discrimination in all institutions of higher education, yes, across the board."

While I was in Congress there were numerous efforts to amend title IX, in a variety of ways, and these, the very introduction of these amendments, underlines and demonstrates the understanding of the Members that title IX's broad institutionwide coverage would prevail unless they offered, prevailed in offering amendments which would exclude things like athletics, choirs, and other specific amendments that were offered.

This understanding paralleled my own. If Members had viewed title IX's scope of coverage as narrowly as the Supreme Court's *Grove City* decision, they would not have felt the need to introduce amendments to exclude those areas. In my considered judgment it was clear that these areas were covered by title IX, unless there was specific statutory exclusion.

One area in which a Member of the other body sought to exclude was revenue-producing intercollegiate athletic activities, and this exclusion was sought from title IX in 1974 and 1975. Instead, the Congress passed the Javits amendment which specifically underlined the inclusion of athletics in the title IX coverage, and called for HEW to include athletics in the title IX regulations, which were in progress of formation.

When this occurred, the dire predictions of what this would cause in college sports were not fulfilled. There were those who made dire prophecies that title IX would mean the death of college football. Alabama still has a football team, as do some other schools around the country.

Chairman PERKINS. Let me ask you, Mr. Buchanan, after the Supreme Court decision, if we failed to enact this legislation, will title IX just about become meaningless as far as the original intent is concerned?

Mr. BUCHANAN. Yes, Mr. Chairman. In my considered judgment it would. I believe it was clearly our intent to give broad coverage and to end discrimination to the extent it was in our power to do so, in the Nation's schools and colleges.

I think with this selective interpretation, as Ms. Berry has pointed out, there will be so much confusion, so many cases will end because they cannot determine where the money precisely goes, and with this selective interpretation, I think for all practical purposes the effect and power of title IX would be destroyed.

Chairman **Perkins**. Mr. Sensenbrenner.

Mr. **Sensenbrenner**. Thank you very much, Mr. Chairman.

First of all let me state that it was at my suggestion that the Civil Rights Commission was invited to present testimony today, and I too regret the inability of Chairman Pendleton to appear, and hope that he will be able to come, hopefully accompanied by Ms. Chavez, some time before the hearings are concluded on this bill. Because I do believe that their input on a major civil rights bill is important before we go to the markup process.

Let me also commend Father Byron for an excellent statement and excellent suggestions. One of the concerns that has been expressed by a number of people is that this bill could provide the vehicle for bureaucratic overreaching in the enforcement of title IX, and by having a presumption of innocence until proven guilty, together with a more uniform adjudication system, I believe that a lot of the fears that have been expressed by many, including some in the administration, will prove to be unfounded.

The one question I would like to ask of you, Father, if I may, is a number of members of the committee have received a letter from Representative Garcia expressing the fear that the educational opportunities for minority students will be diminished because a number of small colleges and universities will simply decline to accept Federal funds and decline to admit students who are attending school on Pell grants, simply as a way of getting out of the provisions of H.R. 5490.

Since you are here representing a wide coalition of associations of colleges and universities, even though you don't represent one of the smaller institutions of higher education in the country, could you comment on whether Representative Garcia's fear is founded or not?

Father **Byron**. Based on my own experience, and I have had some experience at small institutions, I would say it's unfounded. I have been talking to people over the last month or two about this in various parts of the country, and I don't see any groundswell in that direction. I think that there is widespread support in the small as well as the large institutions for the principles that are embodied in this proposed legislation, and I think the legislation will be welcomed and the conduct of those institutions would go on as normal.

We're more concerned about the student aid provisions to get those minority students into these small institutions.

Mr. **Sensenbrenner**. I really have not been keeping up on educational trends, but it does appear to me that this bill does expand the enforcement of the section 504 rules relating to access by the handicapped.

Father **Byron**. Yes.

Mr. **Sensenbrenner**. That can run into quite a bit of money, particularly with older buildings and making them wheelchair accessible, and those kinds of costs would be a major concern of a university administrator in deciding what to do should this bill pass.

Father **Byron**. They're concerns but the understanding of section 504 has been program availability, not every square inch of the campus being available, and I think that's an important distinction, and I think there may be some need to clarify the definition of "handicapped," whether it's self-declaration of handicapped or whether there is a more general norm that could be applied to individual cases. But I would say that is a separate issue from the principle.

The principle of access to the handicapped would be accepted by every institution in the associations that I'm representing here today.

Mr. **Sensenbrenner**. Do you know if a lot of the construction to provide the wheelchair accessibility for the handicapped has already been accomplished in many of these smaller schools?

Father **Byron**. If the understanding is that if it's program availability rather than every square inch of the campus, I'd say a very large percentage of it has been. But I wouldn't want to judge that because I'm just simply not competent to do so.

Mr. **Sensenbrenner**. Thank you. I believe that your answers have been very helpful in allaying a few more fears. I yield back the balance of my time.

Mr. **Edwards**. The Chair recognizes the——

Ms. **Berry**. Mr. Chairman.

Mr. **Edwards**. Oh, yes, Ms. Berry.

Ms. **Berry**. May I tag onto the answer to the question? Even though I'm not from a small, private college, and the colleges I ran were big colleges, I do have some experience as Assistant Secretary in monitoring the section 504 enforcement and the program of accessibility in those institutions, in conjunction with OCR, and when I was running the Higher Education Division some attention was paid to that problem.

Section 504 would not be enlarged in any way by what is happening in H.R. 5490. Program accessibility has been understood by institutions of higher education all the time as being required everywhere on the campus where handicapped students or disabled students should expect to have access.

There are other provisions of law, and there are other considerations in terms of deciding what program accessibility is, and issues like that, which we could go on all day long about. But it's not understood by anyone that I know about or by myself, based on my experience and analysis of it, that there is any intention to expand section 504 coverage by this bill.

Mr. **Sensenbrenner**. Thank you.

Mr. **Edwards**. The Chair recognizes the chief sponsor of this bill, the gentleman from Illinois, Mr. Simon.

Mr. **Simon**. I thank you very much and I thank all three of our witnesses. To my former colleague, if he had not stood up on these issues, if he had not shown backbone, instead have shown spinelessness, he'd probably be a member of this committee yet today. Not that I don't want you as a member of the committee, but I commend you.

I join my colleague, Mr. Sensenbrenner, in thanking you, Father Byron, for your suggestions. I think particularly the uniformity of the regulations is something we ought to be able to cover through report language. That is a problem, and unnecessarily a problem.

Dr. Berry, your statement, I just thought, was excellent. I assume you're speaking for the entire Civil Rights Commission. Is that correct? [Laughter.]

Ms. **Berry**. My understanding, Mr. Simon, is that six members of our eight-member Commission voted in favor of broad coverage of the statutes involved, but they thought that there ought to be all kinds of amendments added to the bill which would delay its passage, and which are on issues that don't need to be decided while this bill is under consideration.

So, I and my colleague, Blandina Cardenas Ramirez, dissented from that view we share with our colleagues—and in that sense I'm representing the Commission's views—that this bill ought to be passed and there ought to be broad coverage under these statutes, although they would prefer to have some amendments that I regard as crippling.

But while I have the mike, may I make just one other point, Mr. Simon?

Mr. **Simon**. I have never been able to stop you in the past and I'm not going to try now. [Laughter.]

Ms. **Berry**. I want to make a point that is in my testimony but I wanted to call attention to it. No institution of higher education has ever had its Federal funds terminated for violating these laws. Never. It has never happened. Never.

The only fund terminations have been in elementary and secondary education. And although administrators, including myself, on a campus complain about people coming in and asking questions and all the papers that have to be put together and so on, the reality is that fund termination, as it's narrowly understood, and as it is in this resolution, has been more like a sort of club, sort of to encourage people to do what they would do any way. Most people in higher education and education generally want to do what they understood the law to be before *Grove City* and what they understand the law is now.

But we're not talking about a landscape littered with institutions being terminated all over the place and worried about that. That's just unreal. I thought I'd point that out.

Mr. **Simon**. That is a very good point. If I could comment, also, on Mr. Sensenbrenner's concerns on section 504, in hearings we held on section 504 a few years ago, the same thing occurred. For any institution that shows any willingness to move in the right direction, there was no pressure on at all. There was one small institution in Minnesota that decided they were simply going to defy the law, and they were brought in, and after consultation, they decided they were going to live with the law and start making progress. But no funds have been cut off. I think that's an extremely important point.

I thank all three witnesses and I apologize to my colleagues for not being able to stay for the rest of the meeting here.

Mr. **Edwards**. Mr. Erlenborn.

Mr. **Erlenborn**. Thank you, Mr. Chairman.

Let me first welcome my former colleague from Alabama. John, it's very good to see you here in this room again, where you served so ably.

Mr. **Buchanan**. Thank you.

Mr. **Erlenborn**. I'm sorry I missed the statements of the other two witnesses because I was somewhat late getting to the committee meeting.

Let me first say that the word is going around that the bill that was introduced and is before this committee is to be passed without amendment, and that if anybody tries to amend it that would be considered unfriendly and anticivil rights. Do any of you share that thought or do you believe that the committee ought to work its will, improve the bill, and entertain amendments in the normal fashion?

Yes, Dr. Berry.

Ms. **Berry**. I don't know if anyone else wants to comment.

I do not believe, Mr. Erlenborn, that any changes beyond what is being proposed by the sponsors ought to be made at this time, and the reason why I believe that is because, one, all the principles of law that have been elaborated in cases in terms of how you interpret antidiscrimination remedies are still there, are available, would apply under the new legislation, as they did under the old, and those are being worked out in court decisions where facts are brought in and they are debated, and some of them are very sticky issues, trying to figure out what precise remedy to use in a case.

I think debates over amendments would, in fact, delay passage.

As I pointed out in my testimony, since February when the decision was handed down, there has been an interruption of the enforcement effort in the Department of Education. I have statistics cited in my testimony which I forgot to ask be put in the record, but I hope there would be no objection to doing so.

But in any case I don't know how much more has happened since April 18, which is the date that those statistics ran to, and I think that it would be unfortunate to have a protracted debate that would cause people's education to be interrupted and all kinds of things happening, without addressing the narrow purposes that are in this bill. Then if somebody wants to address something else, let them do that some other time. That would be my view.

Mr. **Erlenborn**. Well, let me say that I don't know of any legislation that's gone through this committee that's taken months and months to mark it up. It usually takes a day or two. And, very frankly, I think we were elected to do our job as legislators to look at legislation carefully and improve it, make it better, if it needs amendment, in our opinion. I don't think that any legislation that is introduced ought to be sacrosanct. The draftsmen may have missed something. They may have misinterpreted something. Maybe if more care had been given earlier, when title IX was passed, we wouldn't have had the dispute that was the subject matter of the Supreme Court decision just recently.

So, I would hope that the organizations that support this would not consider it unfriendly if people tried to do the job they were elected to do, that is, to legislate, and to pass judgment on legislation and then improve it before sending it out to the floor for passage. I think it ought to be subject to amendment there too, rather than being put on the suspension calendar to avoid the full legislative process, and prohibit Members from offering amendments if they so desire.

Let me make a comment that may parallel what I said the other day in the hearings here. But I welcomed the decision not because I'm anticivil rights, but the *Grove City College* decision, I think, was a blow for—or against—newspeak. We had before us, when title IX was passed, legislation that did say that we could cutoff funds to the institution. That was not adopted. The legislation that was adopted and became title IX said "program or activity," and people have since then wanted us to interpret the words "program and activity" to mean "institution." Very frankly, I think we are artisans here, as makers of the law. Our tools are words. If we blunt our tools in that fashion to make things mean what the clear meaning of the word would not indicate, merely to attain what we consider to be a desired end, I think we're blunting our tools to the point where we cannot be effective, just as if a carpenter were to blunt his saw, or damage his hammer.

I just don't think that we ought to try to accomplish our ends in the law by twisting the meaning of words beyond what the normal meaning would be.

Father, how do you react to that observation?

Father Byron. Well, I quite agree. I think I sat in this same chair testifying on H.R. 31, math and science, and we were talking about, in a general sense, about the condition of education. I remember saying then that the world moves on words and numbers, and we have to have competence in managing both words and numbers if we want to get progress. And it seems that this great Congress moves an awful lot on words, and precision there is important.

So, I would suspect that your point that you're making now would relate to the question of amendments that would clarify the intention for the application of the legislative principles upon which we all agree. Just make it clear. That would not be inappropriate.

But to widen the field for legislation by this occasion might be inappropriate. Clarity is welcome.

Mr. Erlenborn. John.

Mr. Buchanan. Thank you, sir. I will say to my distinguished former colleague that I would hesitate to say that anything is unimprovable or tell legislators not to legislate in any way, and the Congress should be more precise.

In my judgment, the totality of the legislative history would suggest that this legislation fulfills the intent, at least of most of us who were participating in the process, but obviously the Court did not find our words to say that. So, I personally strongly urge the passage of this legislation. These words spell out very clearly what at least was my intent in the first place, and I think that of many others.

But on the subject of amendment, I would urge that this legislation be expedited in every way that is reasonably possible, because it is late in an election year session and this is a case where justice delayed is justice denied in certain cases, in the first place. In the second place, we face a situation where there is already confusion, suspension of enforcement activity, and there would be room for great deterioration should we wait until the next Congress to remedy this matter. And I really think expeditious action is called for and may be difficult to achieve, but I think it will be worth that difficulty, considering the magnitude and the seriousness of the matter at hand.

Mr. **Erlenborn**. I think it's the intention of all of those who drafted and support this legislation to give the broadest possible application of this civil rights law to colleges and universities, and other institutions of education.

Why, in your opinion, do we not just say that we cover all of these institutions, rather than tie it to the receipt of Federal funds? Do we have a constitutional inability to extend the civil rights reach of the law unless we condition it on the receipt of Federal funds? Is there a necessity to tie this to the receipt of Federal funds? Or could you broaden this and bring everybody under your scope by removing that as a condition and just say every institution is subject to the reach of title IX?

Ms. **Berry**. Well, Mr. Erlenborn, public institutions, of course, are subject to the 14th Amendment. But private institutions are not public institutions and there is no state action involved. Or one could argue that there isn't, depending on what the facts are. And so you have a different problem. So, tying the receipt of Federal funds is a narrowing provision, to keep from broadening it to purposes where people would privately like to discriminate, without anyone else's money involved. As much as I dislike private discrimination personally, we permit people to privately do all kinds of things, if they're doing it in privacy.

The receipt of Federal funds means that private institutions can be covered, although public ones might be covered under the 14th amendment, at least in race cases. In sex cases there is some difficulty, as you know, because we don't have an equal rights amendment. So the Federal funds limitation serves to narrow in one sense and to broaden for private institutions in another.

Mr. **Erlenborn**. Well, let me just make a last observation, that the ingenuity of the mind of man, plus the broad scope of already-existing Federal legislation, dispensing Federal funds throughout our society, would lead me to believe that there's hardly anyone, if anyone, who won't some time or other be brought under the umbrella of title IX, because there is hardly any activity or any person who isn't, in some way, directly or indirectly receiving the benefit of our Federal largesse. So, maybe it's a distinction without a difference.

Thank you, Mr. Chairman.

Mr. **Edwards**. Mr. Hayes.

Mr. **Hayes**. Mr. Chairman, I wasn't here and didn't have the opportunity of hearing the testimony of all of the witnesses. But as my colleague, the Honorable Mr. Erlenborn was questioning the panelists, I was somewhat disturbed by what I thought was an implication that there is sort of a play on words here. I think there's more involved than just the usage of words. I don't know whether you wanted to leave that impression.

I happen to feel that there's a conscientious attempt on the part of certain elements in Government, to negate the full impact of the Civil Rights Act, and some of these subsequent changes in that act.

I happen to feel, and I think a lot of other people do, that it was by design that the passage of—the Supreme Court decision negated, to some extent on purpose, the impact of title IX under the civil rights statute, and to me I don't know of any other remedy, if you aren't going to withhold funds. Is there another remedy to stop this kind of violation?

In my opinion, I don't think there's any denial of the fact that the decision that was handed down states, essentially, that a college may not discriminate in its financial aid program, because it's covered by title IX. But the college can discriminate in academic departments, admissions, and other functions, without a risk of losing Federal funds.

To me, if we don't enact the proposed legislation to stop this kind of practice, we ourselves are permitting further discrimination in these areas.

Mr. **Nielson**. Would the gentleman yield?

Mr. **Hayes**. I'd be glad to yield to the gentleman.

Mr. **Nielson**. Perhaps you wanted to respond directly? I'll yield to you first.

Mr. **Erlenborn**. Yes, I would, if you would yield, my colleague.

Let me say that if you got the impression that I was using a play on words, I think that you have a misimpression. My argument is for legislating with clarity and my argument is also that if we have done something that is less than clear, rather than to twist words to mean something that they would not otherwise ordinarily mean, to accomplish our purpose, that we amend the legislation and make it clear.

If we engage in making true mean false and black mean white, pretty soon nobody's going to know how to communicate one to the other. I think that clarity in the use of the English language, and I guess I'm just a nut on this point, is terribly, terribly important. I get personally kind of upset when people misuse the English language and begin to make words so foggy and fuzzy in their meaning that we cannot clearly communicate one with the other. That is my argument, rather than some sort of cute play on words.

I hope the gentleman was not under that mistaken impression.

Mr. **Nielson**. Mr. Chairman.

Mr. **Edwards**. Mr. Hayes has the time. Does the gentleman yield?

Mr. **Hayes**. I will yield.

Mr. **Edwards**. The gentleman yields to the gentlewoman from San Francisco, CA.

Mrs. **Burton**. Wouldn't you say, Congressman Hayes, that the new piece of legislation, H.R. 5490, will really clarify title IX?

Mr. **Hayes**. That's precisely right.

Mrs. **Burton**. And this is why we are for it, you and I, and the chairman, Mr. Edwards.

Mr. **Hayes**. I would say that exactly but I'm not too sure if my colleague, Mr. Erlenborn, is for it, based on what he said. Maybe he can clarify that position for me. Are you for or against H.R. 5490?

Mr. **Erlenborn**. Well, if my colleague would yield, let me say I have carefully not said yet whether I'm for it or against it. [Laughter.]

Mrs. **Burton**. The language is clear, Mr. Erlenborn, in this bill.

Mr. **Erlenborn**. Well, very frankly, I haven't sat down and read the language yet. My observation is that instead of going through the exercise we had earlier this year, in passing a resolution in the House to try to influence the Supreme Court's decision, for them to read "program and activity" to mean "institution," instead of going through that activity, we could have then, or before then—long ago—amended this law. We didn't have to wait for that Supreme Court decision, if we knew there was a difficulty in the interpretation.

Ms. **Berry**. We didn't.

Mr. **Erlenborn**. Now, I have not said whether I'm for or against it because I'm one of those who likes to hear the witnesses without having closed his mind already.

Mrs. **Burton**. Well, I have another view about the Supreme Court, but we won't debate it now. We will do it after November. [Laughter.]

Ms. **Berry**. Mr. Chairman.

Mr. **Edwards**. Dr. Berry and then I recognize Mr. Nielson.

Ms. **Berry**. I only wanted to say that in looking at the proposed legislation it uses the term "recipient" instead of "program or activity." "Recipient" is already defined in the regulations, and has been defined for years. And so putting the word "recipient" there meaning the same thing it means before, shouldn't cause any confusion, since we've been using it all this time.

And I would say that none of us knew that there was any problem with the language, until the Supreme Court said so. So, if we had known there was some problem with it, maybe we would have been doing something.

But when I was an administrator of those programs, I didn't have any problem trying to figure out what it was we were supposed to be doing, under the relevant Supreme Court decisions before that time, and the lower court decisions, and the administrative rules.

I think putting the word "recipient" in, constitutes very minor changes in the bill, and those minor changes go to simply that kind of definition, and using a definition that we're used to using, I think, ought to help clarify it once and for all.

Mr. **Erlenborn**. If I might respond, I think the *Grove City* case and others have been in the courts for some time, before the Supreme Court rendered its decision. So, I think we all knew there was some dispute as to the meaning of those words. We didn't have to wait for the Supreme Court decision to come down to reveal that.

So, I think the lack of legislative activity was not because we didn't understand there was less than full clarity in the law. Rather, it was a disinclination to subject this to the legislative process again and attempt to attain the end that was desired through reinterpretation of the language of the statute.

Ms. **Berry**. As Mr. Erlenborn knows, Mr. Chairman, the Congress did act while the case was before the Supreme Court, in a resolution that's, what, 400 and something people in the House signed on it, that I think Congresswoman Schneider introduced?

Mr. **Erlenborn**. Yes. I referred to that a moment ago. I'm quite aware that we passed that resolution and we did it to try to influence the Supreme Court. And I think it's very, very healthy that that independent branch of government remained independent and rendered its decision based on the way they felt rather than the influence, the pressure, applied by this body.

Again, I kind of jealously guard that separation of powers and I'm glad to see that it still works.

Mr. **Edwards**. The gentleman from Utah, Mr. Nielson.

Mr. **Nielson**. Thank you. I'm glad the minority, in this case the low-ranking Republican, gets a chance after everyone else is through.

Let me say a couple of things that are on my mind. I should let you know I was a professor at Brigham Young University for 25 years, and that university was involved in title IX proceedings. Title IX at one time indicated they had to revise their athletic facilities to provide gang-type showers for women, or else stall showers for men, which seemed ridiculous at the time.

Our president, Dr. Oakes, who was later a supreme court justice in the State of Utah, fought that all the way up. He finally lost it, because they said, "You are receiving Federal aid, because you have some Federal contracts. You do research for the Government and you get money for that. Therefore, that's Federal aid." And that was a broadening of the original idea.

Let me indicate, I have no quarrel with Mrs. Berry. I have known about you for a long time. I worked with Ted Bell and we have talked about you for a long time. So, I've known you for many years. [Laughter.]

Ms. **Berry**. I haven't had the pleasure of knowing you, though. Now I do.

Mr. **Nielson**. All right. I have no quarrel with your comment that Federal funds should not be used to promote activities which discriminate, or which limit access. I have no quarrel with that. What I do have a problem with is why you say that the narrow interpretation of *Grove City* was in violation of the majority of Congress, when the majority of Congress passed it—in terms of program, not institution?

As I indicated, as Mr. Erlenborn mentioned, the amendment to call it institution was rejected by this committee, of which Mr. Buchanan was a member. It was specifically "program," and that's what it said. That's what *Grove City* said. So, why do you say it was in violation of the majority of Congress? Are you talking about when it was passed or in the sense of Congress just a couple of months ago?

Ms. **Berry**. I am saying that since——

Mr. **Nielson**. No, just which? Just one word.

Ms. **Berry**. Neither. I am saying, Mr. Nielson, that since the 1964 Civil Rights Act was passed, and title IX was based on that, as the Court recognizes and I think everyone does, there have been numerous regulations that have been adopted that the Congress has reviewed and has not objected to, and as the Court says, you cannot always say if you don't object, that means you approve, but there is some weight to that.

There have been opportunities for amendment that haven't been done. There's been enforcement by OCR and the education programs. It has been reviewed by both the authorizing committees and the appropriations committees of this Congress time and time and time and time again, and it's a sustained pattern of interpretation that that was what was meant.

Mr. **NIELSON**. But that's not what you said.

Ms. **BERRY**. That's what I'm saying.

Mr. **NIELSON**. If I may reclaim my time, that's not what you've said. You've said, "Narrow interpretation of *Grove City* was in violation of the thinking of the majority of Congress." And I'm saying, do you think the majority of Congress when the bill was passed or the majority of Congress during its last resolution a couple of months ago?

Ms. **BERRY**. Both.

Mr. **NIELSON**. Then if the majority of Congress believed it should be the entire institution, why didn't the Congress adopt that amendment to put it "institution"?

Ms. **BERRY**. Because they thought "program" would cover it. That's my reading of what the Supreme Court opinion said, both the majority and minority.

Mr. **NIELSON**. What you are saying is to be sure they should have said "institution" in the beginning?

Ms. **BERRY**. No. I didn't have any problem with them not saying that because I always understood "program," both as an administrator on campus and in the Government, as meaning the entire institution, which is what I infer, and the Court did too, that the Congress meant at that time.

Mr. **NIELSON**. I agree with Mr. Erlenborn. I think what we need to do, instead of making a resolution to say we disagree with the Supreme Court, or we think the Supreme Court should do thus and so, we should go back to title IX, shake it up from top to bottom, and revise the whole thing so we know precisely what we mean.

The second thing I wanted to mention to Mr. Buchanan, your statement, you believe title IX would become meaningless unless H.R. 5490 is adopted. I think title IX has an awful lot in it which is defined and everyone knows how to use it, that has nothing to do with the *Grove City* case. In the vast majority of cases the school receives a good deal of aid and there's no problem. The *Grove City* case, in my interpretation, a nonattorney, but the *Grove City* case simply said that *Grove City* does not receive Federal funds as an entire institution. It just has selectivity to certain programs, aid to students and so forth, and therefore should not have to come under the Federal umbrella in the broad sense.

I think Mr. Erlenborn's comment to you, which I guess, I think, was facetious, but he said, "Why not have all institutions covered, whether or not they get aid?" I guess what I'm saying is do you really believe title IX is ineffective without this bill?

Mr. **BUCHANAN**. I believe that it is demonstrated that enforcement activity has virtually ceased, that there is great confusion on the subject. In response to your earlier question, I would point out that there were a number of amendments offered to specifically exclude areas. Some passed, like beauty contests, father-son and mother-daughter events, Girl Scouts, Boy Scouts, YWCA, YMCA, and——

Mr. Nielson. I understand. Your point was well taken there.

Mr. Buchanan. And others failed. Which at least indicated the intent of broad coverage.

But the problem is, with the present confusion created by the *Grove City* case, I think that it would be very difficult to have meaningful enforcement activity, and I think, further, that Congress intended one thing and now the situation in law is something else.

And, therefore, for what Congress intended to be restored, and for what justice requires to be achieved, this legislation needs to be passed and this clarification.

Mr. Nielson. But as I mentioned earlier, *Grove City* has been before us for quite a while and before that Brigham Young University had a case that lasted for several years, starting in 1975. So, this is not new. Why did we wait until 1984 to fix what was obviously a problem with the law? Why did we wait until 1984 to do it?

Mr. Buchanan. I think many people do not believe there was a problem with the law.

Mr. Nielson. In spite of the largest private university fighting it all the way?

Mr. Buchanan. People take people to court and institutions go to court—

Mr. Nielson. This is not a person. This is a 25,000-student institution, the largest private institution in the country, and they won at every level except the Supreme Court. I think that indicates there's some question about the law. I'm just asking why wasn't it done prior to this?

Mr. Buchanan. I would respectfully suggest that if you were to look at the court dockets and see the number of cases and the variety of those cases that arise, if Congress were to try to change the law every time someone challenged language, it would be a very busy scene.

However, I welcome this clarification, if there are those who maintain it to be a strengthening, and I'm not sure I believe that to be the case, I would welcome a strengthening of the law, because if it were in my power to end discrimination in these areas in all cases, throughout the country, I would be very pleased for that to be the end result.

I will say to the gentleman, and I grew up with this underlined in my consciousness, those who are born blind are not as blind as those who are blinded by bigotry. And there's not an institution in this country closed to racial bigots.

Those who are in wheelchairs are less crippled than those who, by sexism, fail to understand that God may give the gift to discover the cure for cancer to a woman, not a man, and therefore it's kind of important to educate women.

And I would, therefore, urge on behalf of the young and the old and the black and the white, and the male and the female, and blind and the lame of this society, that these committees, and that Congress act in this manner, to guarantee our opportunity to become what is in us to be, so that we can give our country what we have to give it, and that really is what this is all about.

Mr. **Nielson**. Let me ask the question then. Don't you think that should apply to all institutions, then, not just those that get Federal aid?

Mr. **Buchanan**. I would love for it to apply to all institutions and all classrooms in America.

Mr. **Nielson**. All right. Now, the second question.

Is your opinion, your interpretation, your recollection, the same as Mr. Erlenborn's, that they did discuss "institution" versus "program" and decide to go with "program?" Is that your recollection as well?

Mr. **Buchanan**. I was not a member of the Committee on Education and Labor in 1972.

Mr. **Nielson**. But you were a voting member of the House?

Mr. **Buchanan**. I was a voting member of the House, and I did vote understanding that the intent was broad coverage, and there were many attempts to limit that coverage, which indicated others thought it was broad coverage.

Mr. **Erlenborn**. Would the gentleman yield?

Mr. **Nielson**. Yes, I'll yield.

Mr. **Erlenborn**. I don't remember the entire legislative history but my recollection is we didn't have a specific amendment offered here in this committee or even in the House. Rather, the first version, as introduced by Senator Bayh, had the word "institution." That was offered as an amendment and was then rejected on the issue of germaneness.

The second version that then, ultimately, became the law changed the word "institution" and used the phrase "program or activity" instead. And the general rules of construction are that, when you make a change, it's for a reason, that if you leave one phraseology and adopt another, it's to indicate that you are doing something different or you mean something different.

My whole point here this morning and the other day was not to pass judgment on this legislation—and by the way, I applaud your statement, John. I would thoroughly endorse it, as you know—but rather, to argue that—and maybe this is my Jesuit training coming out, Father, but the end does not justify the means—if we agree on what it is we want to accomplish, I think that we could also agree that we ought to do it in an open, straightforward, way, without the machinations of "newspeak," saying black means white and "program or activity" means "institution."

Mr. **Buchanan**. Mr. Chairman, the gentleman from Illinois knows that he is one of the Members of Congress I greatly admire, in his integrity and his honest intent. There can be no question of that. And, as usual, he has spoken eloquently and well.

I would suggest that it is my conviction that if the language of this legislation is thoroughly studied, you will find it a good remedy to the very thing to which you raise objection. It is certainly clear language. And, therefore, I would urge your favorable consideration of this.

Mr. **Edwards**. Well, we thank all the witnesses for very helpful testimony.

Ms. **Berry**. Thank you, Mr. Chairman.

Mr. **Edwards**. Our next two witnesses will constitute a panel. Dr. George C. Roche III. He is president of Hillsdale College in Hillsdale, MI. And Mr. Bruce Hafen is president of Ricks College, and he is speaking on behalf of the Association of Independent College and University Presidents. Without objection, both statements, in full, will be made a part of the record.

I believe that Dr. Roche is first.

[Prepared statement of Dr. George C. Roche follows:]

PREPARED STATEMENT OF GEORGE ROCHE, PRESIDENT, HILLSDALE COLLEGE, HILLSDALE, MI

I appreciate the opportunity to testify before these assembled sub-committes this morning. The bill under consideration, H.R. 5490, the "Civil Rights Act of 1984," is meant to clarify the intent of, and close certain perceived loopholes in, several existing statutes including Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964.

My credentials to testify on this legislation are not so much personal as institutional. As president of Hillsdale College in Michigan, I have the privilege of appearing today on behalf of an institution which enjoys an unparalleled 140 year record of commitment to individual dignity, equal opportunity, academic freedom, limited government and the self-responsibility of free men and women associating to achieve their purposes in private, voluntary ways.

In particular, Hillsdale can submit for your consideration the sobering lessons of its nine-year ordeal of litigation and bureaucratic harassment under a tortured interpretation of Title IX—an ordeal that could be re-enacted thousands of times throughout our society if this bill becomes law.

I might add that my personal experience with the subject under consideration today also includes having served since 1982 as Chairman of the National Council on Educational Research, a policy-setting body within the U.S. Department of Education, and having authored several books in this field. *Education In America* (1971) analyzed the current state of teaching and learning in this country and anticipated many of the findings of the celebrated 1973 Presidential Commission Report, "A Nation at Risk." *The Balancing Act: Quota Hiring in Higher Education* (1974) explored the harm being done to free inquiry by reverse discrimination policies. *America By The Throat: The Stranglehold of Federal Bureaucracy* (1983) explored the dynamics of growing government power at the expense of the private sector and the individual.

H.R. 5490 has been impressively titled the "Civil Rights Act of 1984." This title certainly commands our most respectful attention. After all, it was exactly thirty years ago today, a few hundred yards from this spot, that civil rights received an historic affirmation when the U.S. Supreme Court handed down its ruling in Brown vs. Board of Education.

The self-evident truth that all men are created equal, proclaimed by Jefferson and The Declaration of Independence and pushed forward signficantly yet not conclusively by Lincoln in the Emancipation Proclamation, gained new meaning and force for Americans of all colors and both sexes in the 1954 Brown decision. The wake of federal, state, and local government power was decisively shifted in one stroke on that May morning—shifted at long last away from the side of unjust, unequal treatment of persons according to irrelevant labels and categories, over to the just, right, and moral side of impartial treatment, individual merit, and equal opportunity for all.

The ensuing three decades have been a long road of implementation for the original color-blind principle of the Brown decision, of course. There have been other legislative and judicial milestones along the way—many moments that we can be proud of as a nation. There have also been unfortunately a number of wrong turns in the road, moments of losing the clear principle and slipping back to the old injustice under new disguises. There have been moments when the very principle of equal rights for all has been violated, turned completely upside down, in the name of equality itself. As patriotism and the flag can sometimes become the refuge of scoundrels, so the rhetoric of civil rights is sometimes appropriated by the power hungry and the seekers of special privilege through government intervention on their behalf. All of us who cherish the genuine article called civil rights and equal treatment bear the obligation of vigilance against such counterfeits as these, counterfeits which both dishonor the concept of equality and visit very real harm upon individuals in our society as well as upon the institutions which helped provide structure and meaning in the lives of individuals.

Mr. Chairman, after careful study of the proposed legislation, I would have to say with sadness that to call this bill the "Civil Rights Act of 1984" reflects no truth in labelling.

The bill would enforce not civil rights, but civil wrongs. Those wrongs would be perpetrated upon institutions both large and small, both public and private, throughout our society. Schools and colleges, hospitals and clinics, agencies of state and local government, large corporations and the corner grocery store, all would be subjected to vague anti-discrimination fishing expeditions by federal enforcement officials operating in a climate of perpetual suspicion and often without clear jurisdictional boundary even between one federal enforcement office and the next.

The financial, administrative, and psychological cost of doing business and delivering necessary services would be significantly increased for all the entities I have named. In the end, the burdens, the penalties, and the inconvenience would rest most heavily on the individual citizens who look to these entities for services—and as usual, the citizens who are the most disadvantaged would feel the effects most sharply. More often than not, these would be members of racial minorities, or women, or handicapped people, or the elderly—the very persons this bill purports to protect.

And for what? To ensure that no one is discriminated against, that no one is treated unfairly. The goal is a noble one, but there are already ample statutes, enforcement powers and court rulings on the books, to see the goal progressively better realized. There comes a point at which granting ever broader enforcement powers to government and imposing ever more stringent reporting and compliance requirements on our public and private institutions, begins to become counter-productive. That point has been reached with the bill presently under consideration.

As Professor Harvey Mansfield of Harvard recently put it, many affirmative action programs and other anti-discrimination activities of government have become in the 1980s, attempts to kick down a door that is already open. That kind of kicking, blindly continued in response to interest group pressures or rhetorical abstractions rather than in proportion to genuine need, is bound to hurt someone. In this case, I submit that it hurts both those who are in the process of passing through the open door of equal opportunity in our society and those officials already working in good faith to hold the door open, and in fact it may even hurt the very structure of the door itself.

That is, this blind pursuit of social perfection, this snowballing aggrandizement of federal power and proportionate subjugation of every other institution to such power, is beginning to weaken in a very real way, the pluralism, diversity, and broadbased institutional stability of American life, the stability and adaptability that have been the source of our marvelous openness and youthfulness as a society over the past two centuries.

The Supreme Court, ruling in the case *Grove City College* v. *Bell* this past February 28, acted with a measure of sensible recognition that the remedy for actual or potential discrimination must be proportionate to the harm such discrimination might do. Specifically, the court ruled that the monitoring of nondiscriminatory conduct by a college or university under Title IX is program specific—that it does not extend throughout an entire institution by virtue of grants to one particular department or activity within the institution.

Now, in an election year rush to set aside this sensible ruling, the present legislation has been drafted in breathtakingly broad terms—whether by design or carelessness I have no idea—but nonetheless with the very real effect of sweeping away the program specific limitation, not only within education, but also in all of the other areas and institutions I mentioned a moment ago.

Taking stock of the federal bureaucratic aggrandizement certain to flow from enactment of the bill in its present form, and of the corresponding congestion and demoralization within many other institutions thus subjected to the heavy hand of bureaucratic monitoring, we can safely say that the cure being proposed here is far worse than the disease which the sponsors of the bill have diagnosed—if in fact the diagnosis itself is even correct.

And I must personally disagree with that diagnosis as well, Mr. Chairman. Judging by the yardstick of limited government as laid down in the Declaration of Independence and the Constitution of the United States, judging by any measure of a healthy balance between the public and private sectors in a free society, I believe we must conclude that legislative action in response to the *Grove City* decision ought to be just the opposite of what the present bill envisions.

The concept of program specificity is reasonable and sound. The Congress should if anything reaffirm it with legislation, not supersede it.

It is the other half of the Grove City decision, much less noted in the press and here on Capital Hill, which urgently needs to be overturned. I refer to the unanimous holding of the court to the effect that something called "indirect aid" to a college or university (and hereafter, should the present bill pass, to countless other institutions as well) occurs whenever an institution accepts from one of its students, customers, or clients, a dollar which that private individual received from some federal assistance program. This "indirect aid," the court ruled, subjects the recipient institution to federal control every bit as much as the institution's own direct acceptance of federal funds would do. I believe that it is difficult to overstate how pernicious and how widespread would be the effect of allowing such a doctrine to stand as the law of the land, let alone extending that doctrine through the present bill to cover vast new areas of activity which were previously understood as private.

One of the great sources of strength for America has been our status as an open society. Within that society the individual has been free to provide for himself and his family, to compete with others, or to combine with them in private voluntary associations. We have been free to support those professions, businesses, schools, hospital or churches which best met our individual needs and preferences. In other words, we have prospered with competition and voluntary association, with the private sector in all its diversity.

We have done this in America, not through any commitment to an abstract ideology, but because we found it to be a system which works well. In the words of George Santayana, "The American people have made a philosophy out of not having a philosophy." We have found that the system works not only in the production of wealth, but also in the redistribution of wealth into all those channels of society where people felt it would yield the greatest results. We have proven that when men have the right to form those private, voluntary arrangements which solve their problems and meet their needs, both they and society will prosper.

The system has worked beautifully beyond the wildest dreams of the most utopian social planner. But it has worked precisely because we have allowed these voluntary associations the right to compete, the right to be different and the right to be uniquely themselves. When competing services are available, people have a choice and every choice extends freedom a little further. Competition and voluntary association change freedom from an empty battle cry into a vital part of everyday life.

Such freedom gives people the opportunity to make decisions on the basis of their own needs and preferences. And those decisions are not merely an additional freedom—they are freedom itself. When we have real control over our lives and preferences—over how we earn a living, worship our God, educate our children—real freedom is present. In the absence of such choices, words like freedom become meaningless abstractions.

Competition and voluntary association, sometimes called the private sector here in American society, have done more to provide the essential mechanism of freedom than any other single element in our national make-up. We Americans have made freedom work. Those most progressive occasions in American society, in the best sense of the word, have been those occasions when our society was most truly free. And it is the private sector which has made this possible. Sweeping away all distinctions between the private and public sectors threatens that political, economic, and social success.

Not too many years ago Hillsdale was assured by government planners and by many educators throughout the nation that government subsidy of education would not bring government control. How distant and dated such assurances seem now. Those institutions which have chosen to sup at the government table now find that they are subject to a great and growing mass of bureaucratic control. National social engineering projects on the part of the public sector are replacing private standards with public standards concerning what teachers are to be hired, what students are to be admitted and what is to be taught in the classroom. Political pressures are rapidly replacing private standards as the arbiter for most educational decisions undertaken today.

Limited government is the very cornerstone of our American system. Limited government means that most of the institutions and most of the decisions in a society remain private and voluntary, not public and coercive. The "indirect aid" formula advanced under Title IX and affirmed by the Supreme Court in *Grove City* v. *Bell*, effectively holding that every dollar which had ever passed through federal hands continues to carry federal control with it wherever it is spent thereafter, makes a mockery of the limited government idea. It goes far toward erasing any meaningful distinction between what is public and what is private in the United States any more.

That the Supreme Court should have upheld this doctrine without a single dissenting vote is disturbing evidence of how lightly the principles of the Declaration of Independence are regarded today, even by the constitutional bodies most sternly charged with their guardianship.

That both Houses of Congress are now moving with ill-considered haste to take up legislation for extending the "indirect aid" doctrine beyond education into every area of American life, is certainly more depressing still.

Let me turn now, Mr. Chairman, to Hillsdale College's experience over the past decade, under the impact of precisely the kind of legislation which the present bill would vastly extend.

Hillsdale College has for 140 years shunned both government assistance and government control in order to fulfill its founders' purpose of offering a liberal arts education untainted by the restrictions on free inquiry which inevitably accompany reliance on government support.

Founded by Free Will Baptist abolitionists in 1844, Hillsdale has always had a vigorously open admissions and employment policy. The first woman in Michigan, and the second anywhere in the United States, to receive a Bachelor of Arts degree was an 1852 Hillsdale graduate. Blacks were also among Hillsdale's first graduates, nearly a century before it came to Washington's attention to press for open admissions.

Yet despite this record of absolute independence from government funding of any kind, and despite this exemplary record of non-discrimination and equal opportunity—a record never challenged by the government or anyone else—Hillsdale has found itself since 1975 defined as an institution receiving federal aid, through the farfetched semantic definition I alluded to a moment ago. Hillsdale's alleged status as an institution receiving federal aid is based on our enrolling students who receive federal grants and loans as individuals, and then elect to apply those funds toward their tuition at Hillsdale. When this pretext for the extension of government control over our affairs as a private college was first put forward nearly a decade ago, the Hillsdale College Board of Trustees formally resolved to resist the intrusion by all means available to us. Hillsdale was the original litigant in what subsequently came to be called the case of *Grove City College* v. *Bell.* As mentioned earlier in my testimony, the Title IX "indirect aid" pretext for government intervention is the affairs of Grove City College and Hillsdale College was finally upheld by the U.S. Supreme Court earlier this year.

That ruling appears to present Hillsdale with a stark choice. We can either sign a compliance form acknowledging we are subject to federal control—in effect, a blank search warrant authorizing widespread bureaucratic intrusion into our records and decision-making processes, an obligation for Hillsdale to be considered guilty until proven innocent, even in the absence of any allegations against us. Or we may have to disengage from the National Defense Student Loans, Basic Educational Opportunity Grants, and other student assistance programs in question, at significant potential hardship to hundreds of our students and major financial jeopardy for the college. We estimate that as many as 300 of Hillsdale's 1000 students might be affected by such a disengagement from student aid programs, at a total cost approaching $1 million per year.

Yet Hillsdale College's response, voted unanimously by our Board of Trustees on May 11, 1984, remains consistent with our stand for principle since 1844. We shall stand on our refusal to sign the compliance forms when and if they are next presented to us. And if such a refusal makes it necessary, we shall cease accepting, from any student, tuition dollars with federal strings attached. We shall endeavor to make available, to any student thereby deprived of federal aid, equivalent funds from private sector sources.

The Supreme Court's interpretation of Title IX as justifying federal control over any institution where individual aid recipients spend their funds, is an Alice-in-Wonderland attempt to police discrimination where no discrimination has been alleged. All of the dislocations, burdens, injustices, and hardships which I hypothetically described in reference to the likely effects of the bill you are considering, are now on Hillsdale College's doorstep as realities. Yet the fact remains that Hillsdale has been extending equal opportunity to women and blacks since well before the Civil War, and that its record this regard has never been disputed by the government. Ironically and tragically, by forcing Hillsdale to warn its students away from accepting federal tuition aid, as the price of preserving our independence from government control, the *Grove City* ruling—and still more so the proposed legislation—

threaten to narrow the very conditions of equal educational opportunity they purport to defend.

Speaking again simply for the one small institution I am associated with, Mr. Chairman, I can state that Hillsdale is determined that neither the Court ruling nor the proposed legislation will actually have such a discriminatory effect in our own case. We are committed to replacing any lost federal dollars with equivalent private resources made available by fair-minded individuals throughout this country who have come forward to stand with us in increasing numbers since this case began nine years ago.

The legislation before these Subcommittees may pass, or it may fail of passage. Based on the election year mood that seems to prevail, I am not sanguine that the legislation will be rejected. Nevertheless, we at Hillsdale hope to make it clear by our example that there is another path Americans can take. The principle of private independence from public intervention, thought severely set back in Congress and the courts, can still find ultimate defense in the marketplace. This is the defense to which Hillsdale College will turn if our next round of rejection of the Title IX compliance forms makes it necessary. We shall set out to make enrollment at Hillsdale accessible to students of every economic background with the sole support of dollars honestly earned in the free economy and voluntarily donated to this private institution, dollars that have never had to be taxed away by the government middleman and then redistributed through tuition aid programs with strings attached. The Supreme Court and Congress seem to be saying, wrongly but unequivocally, that wherever federal dollars can remotely be construed to go, federal control will now go with them. There remains no benefit of the doubt for private institutions, no grey area. Hillsdale will therefore have no choice but to step decisively out of that former grey area and affirm its total reliance on those private sector resources from which American's strength has always grown.

If the proposed legislation passes, this will be the only recourse for many other formerly private institutions which wish to preserve their independence. Unfortunately, countless other institutions will find themselves too heavily entangled already with federal assistance to disengage totally as we propose to do. It is especially for the protection of such institutions caught in the middle that the hasty overreaction embodied in the proposed bill must be rejected by the Congress, if clearer heads can prevail.

Ultimately the question comes down to our asking "What sort of society do we want?" If we have no objection to a directed and regulated society, then there will be no objection to the bureaucracy operating in the way it does, often making its decisions administratively rather than by public consent in elective chambers. There can be no objection to it using its powers to discriminate against all alternative philosophies and all alternative ideas of service if what we want is a regulated and directed society. Nor can we object to seeing bureaucrats as those who make the decisions, defining what constitutes an adequate education, or appropriate health care. We cannot complain about these things if what we want is a regulated and directed society. And no protest can be made when we see every passing craze and unbalanced ideology foisted into our service institutions in the name of "progress." I repeat: *No complaint can be made if what we want is the directed and regulated society.*

If, on the other hand, we seek a society in which men and women make their own decisions, and have the right to choose institutions and services which are compatible with their own deeply-held convictions, then we must sharply limit the power of the governmental regulatory agencies, putting that power back in the hands of the American people.

Do the American people wish to lead their own lives and make their own decisions, or do we want a Washington bureaucracy to control our lives and make our decisions for us?

I believe the answer to that question is self-evident. Accordingly Hillsdale will continue to contest the extension of arbitrary and capricious bureaucratic interference with the private affairs of individuals who freely choose to attend our college and with the legitimate sphere of decision-making of the college itself. By the same principle, I urge in the strongest terms that these Subcommittees act unfavorably on the misconceived, mis-named, and dangerous legislation now before them.

I thank the Chairman and the members for this opportunity to present my views and those of Hillsdale College. I will welcome your questions on any portion of my testimony.

STATEMENT OF DR. GEORGE C. ROCHE III, PRESIDENT, HILLSDALE COLLEGE, HILLSDALE, MI

Dr. **Roche**. Thank you, Mr. Chairman.

Mr. **Nielson**. Mr. Chairman.

Mr. **Edwards**. Mr. Nielson.

Mr. **Nielson**. May I have the privilege of introducing Dr. Hafen?

Mr. **Edwards**. The gentleman from Utah is recognized.

Mr. **Nielson**. Dr. Hafen is president of Ricks College, which is an affiliate of Brigham Young University. I have known him for many, many years. His wife, Marie, was my secretary when I was chairman of the department of statistics, and I want to personally welcome you here, Dr. Hafen.

Dr. **Hafen**. Thank you.

Mr. **Edwards**. Thank you, Mr. Nielson. And, Dr. Roche, you may proceed.

Dr. **Roche**. Mr. Chairman, I'd like to request that the full text of my more extensive written remarks be included in the record.

Mr. **Edwards**. Without objection, so ordered.

Dr. **Roche**. Thank you.

My credentials to testify on this legislation are not so much personal as they are institutional. As president of Hillsdale College in Michigan, I have the privilege of appearing on behalf of an institution which has enjoyed an unparalleled 140-year record of commitment to individual dignity, equal opportunity, and academic freedom. In particular, I think, Hillsdale can submit for your consideration the sobering lessons of 9 years of litigation and bureaucratic harassment under a tortured interpretation of title IX, an ordeal which could be reenacted for virtually thousands of institutions throughout our society if the bill now before you should become law.

So, I am speaking as the burned dog who dreads the fire.

H.R. 5490 has been impressively titled "The Civil Rights Act of 1984." And this title certainly commands our most powerful attention. After all, it was exactly 30 years ago today and a few hundred yards from where we are right now that civil rights received a historic affirmation when the U.S. Supreme Court handed down its ruling in *Brown* v. *The Board of Education*.

The self-evident truth that all men are created equal, proclaimed by Jefferson in the Declaration of Independence, and advanced significantly, later, in the Emancipation Proclamation of President Lincoln gained new meaning and force for Americans of all colors and both sexes in the 1954 *Brown* decision. The wake of Federal, State, and local government power was decisively shifted in one stroke on that May morning, shifted at long last away from the side of unjust, unequal treatment of persons according to irrelevant labels and categories, over to the just, right and moral side of impartial treatment, individual merit, and equal opportunity.

The ensuing three decades have been a long road of implementation for that original color blind principle. There have been other legislative and judicial milestones along the way and a number of moments of which we have every right to be proud as a nation.

There also, unfortunately, have been a number of wrong turns along the way, moments of losing the clear principle and slipping back into the old injustice under new disguises.

There have even been moments when the very principle of equal rights for all have been violated, turned completely upside down, in the name of equality itself. Just as patriotism and the flag can sometimes become the refuge of scoundrels, so the rhetoric of civil rights is sometimes appropriated by the power hungry and the seekers of special privilege, through government intervention on their behalf.

All of us who cherish the genuine article called civil rights and equal treatment bear the obligation of vigilance against these counterfeits, counterfeits which both dishonor the concept of equality, and do real harm upon the very individuals whose rights we intended to protect.

And, Mr. Chairman, after a careful study of the legislation before you, I must say with sadness that to call this bill The Civil Rights Act of 1984 reflects no truth in labeling. The bill would not enforce civil rights but civil wrongs. These wrongs would be perpetrated upon institutions, large and small, public and private, throughout our society, schools, colleges, hospitals, clinics, agencies of State and local government, large corporations, the corner grocery store. All would be subjected to vague antidiscrimination fishing expeditions by Federal enforcement officers, operating in a climate of perpetual suspicion, often without clear jurisdictional boundaries, even between one Federal enforcement agency and another.

The financial, administrative, and psychological cost of doing business and providing necessary services would be significantly increased for virtually all the entities I just named.

In the end, of course, though, the burdens, the penalties, the inconvenience, would rest most heavily on the individual citizens who look to those institutions for service. And, as usual, the citizens who would be most disadvantaged would be members of racial minorities, women, handicapped, the elderly, the very people this legislation intends to protect. And for what? To ensure that no one is discriminated against, that no one is treated unfairly?

The goal is a noble one. But there are already ample statutes, enforcement powers, and court rulings on the books to see those goals realized.

There comes a point where granting ever-broader enforcement powers to Government, and imposing ever more stringent reporting and compliance requirements on our public and private institutions begins to be counterproductive, and that point has, quite clearly, been reached in the legislation which is before you.

Prof. Harvey Mansfield of Harvard recently said:

> Many affirmative action programs and other antidiscrimination activities of government have become, in the 1980s, attempts to kick down the door which is already open. That kind of kicking, blindly continued in response to interest group pressures or rhetorical abstractions rather than in proportion to genuine need, is bound to hurt someone.

In this case I submit that it hurts both those who are in the process of passing through the open door of equal opportunity in our society, and those officials who are working to keep the door open, and in fact, may finally hurt the structure of the door itself. That is, this blind pursuit of social perfection, this snowballing aggrandizement of Federal power and the proportionate subjugation of every other institution to that power, is beginning to weaken, in a very real way, the pluralism, the diversity, the broad-based institutional stability of American life, and it is precisely that stability and adaptability which has been the secret of our marvelous openness and usefulness as a society, over the past two centuries.

The Supreme Court ruling in *Grove City* v. *Bell* on February 28 made a sensible recognition that the remedy for actual or potential discrimination must be proportionate to the harm which that discrimination might do. Specifically, the court ruled that the monitoring of nondiscriminatory conduct by a college or university under title IX is program specific. But it does not extend throughout an entire institution by virtue of grants given to a single department.

Now, in an election year rush to set aside this sensible ruling, the present legislation has been drafted in breathtakingly broad terms, whether by design or carelessness I have no idea, but nonetheless, with the very real effect of sweeping away the program's specific limitation not only in education, but in all the other areas and institutions I mentioned a moment ago, taking stock of the Federal, bureaucratic aggrandizement certain to flow from the enactment of this bill in its present form, and of the terrific congestion and demoralization that will be present in so many institutions as the result of that bureaucratic monitoring, the cure clearly seems worse than the disease, if, in fact, the sponsors of the bill have diagnosed the right disease. And I submit that that diagnosis is also mistaken.

Judging by the yardstick of limited government, as laid down in the Declaration and the Constitution, judging by any measure of a healthy balance between the public and the private sectors in the social order, it seems that the legislative action in response to the *Grove City* decision, ought to be precisely the opposite of what this bill intends.

It is the other half, then, of the *Grove City* decision, not the program specificity, which has been much less noted in the press, and here on Capitol Hill, and it is that portion of the legislation which badly needs to be overturned.

I refer to the unanimous holding of the Court to the effect that something called indirect aid to a college or university occurs whenever an institutions accepts from one of its students, customers, or clients, a dollar which that private individual received from some Federal assistance program. This indirect aid, the court ruled, subjects the recipient institution to Federal control every bit as much as the institution's own, direct, acceptance of Federal funds.

I believe it's difficult to overstate how pernicious and how widespread the effect of this idea might be, because what it will do is open vast new areas of activity to Federal regulation, which have previously been regarded as within the private sector.

Frankly, one of the great sources of strength for America has been our status as an open society. Within that society the individual has been free to provide himself and his family with a necessary living, to compete with others, to combine with others in private, voluntary association. We've been free to support those professions, businesses, schools, hospitals, or churches, which best met our individual needs. In short, we've prospered with the competition and with voluntary associations, with this private sector I'm describing, in all its diversity.

Limited government, to put it another way, has been the very cornerstone of this system. Limited government meaning that most of the institutions and most of the decisions in our social order have remained private and voluntary, not public and coercive. The indirect aid formula advanced under title IX and affirmed by the Supreme Court in *Grove City* v. *Bell*, effectively holds that every dollar which has ever passed through Federal hands, carries with it Federal control, no matter where it's spent thereafter, and in the process makes a mockery of the limited government idea. It goes a long way toward removing any sensible distinction between the public sector and the private. That the Supreme Court should have upheld this doctrine without a single dissenting vote is disturbing evidence of how lightly the principles of the Declaration of Independence are regarded today, even by the constitutional bodies most sternly charged with their protection.

That both Houses of Congress are now moving with ill-considered haste to take up legislation for extending the indirect aid doctrine beyond education, into every area of American life, is certainly more depressing still.

Let me turn now, though, to the specific Hillsdale experience over the past decade, because I think here is a clear and specific demonstration of the impact of what this present bill would vastly extend. Hillsdale is proud of the fact that in 140 years we've shunned Government assistance and Government control, and in the process have been able to offer a liberal arts background that is untainted by any limitation on free inquiry, founded by Free Will Baptist abolitionists in 1844, we've always had a vigorously open admissions and employment policy, the first woman in Michigan, the second woman anywhere in the United States, ever to receive a bachelor's degree, received it on the Hillsdale campus in 1851.

We had blacks as members of our student body and faculty before the Civil War. We were in the antidiscrimination business for over a century before the Federal Government discovered that there was a problem.

Yet, despite this record of absolute independence from Government funding of any kind, despite this exemplary nondiscriminatory and equal opportunity policy, a record which, incidentally, in 9 years of litigation with the Federal Government has never once been challenged, there's never been an allegation that we are discriminatory, Hillsdale has found itself, since 1975, defined as an institution receiving Federal aid through the far-fetched semantic, indirect definition we discussed a moment ago.

Our alleged status as an institution receiving Federal aid is based on our enrolling students who individually receive Federal grants and loans, and then apply those grants and loans toward their tuition at Hillsdale. When this pretext for the extension of governmental control over our affairs as a private college was first put forward in 1975, the Hillsdale College Board of Trustees decided to resist this with all the means at our disposal. We were the original litigant in what subsequently, in the Supreme Court version, has now been called the *Grove City* case.

As mentioned earlier in my testimony, the title IX indirect aid pretext for Government intervention in the affairs of Grove City College and Hillsdale College, was finally upheld by the U.S. Supreme Court earlier this year. And that ruling presents us with a very stark choice which has a direct bearing on the intention of this legislation. We can either sign a compliance form acknowledging that we are subject to Federal control, in effect a blank search warrant authorizing widespread bureaucratic intrusion into our records and decisionmaking processes, an obligation to consider ourselves guilty until proven innocent, even though there are no allegations that have ever been leveled against us.

Or, we have the choice of disengaging from the national defense student loans, the basic educational opportunity grants, the other student assistance programs in education, at significant potential hardship to hundreds of our students and major financial jeopardy to our institution. We estimate that about a third of our student body, on 30 percent or so, 300 of a thousand students, might be affected by such a disengagement, at a total cost of about a million dollars per year.

But Hillsdale's response, recent reaffirmed at a board meeting on May 11 of this year, remains consistent with our stand for principles since 1844. We are going to refuse to sign the compliance forms, if and when they are next presented to us, and if such a refusal makes it necessary, we shall cease accepting from any student the tuition dollars with Federal strings attached. We shall endeavor to make available to any student thereby deprived of that Federal aid equivalent funds from private sector sources.

The Supreme Court's interpretation of title IX as justifying Federal control over any institution where individual aid recipient spend their funds is an "Alice in Wonderland" attempt to police discrimination, even in places where no discrimination has been alleged. All the resultant dislocations, burdens, injustices, and hardships that I have hypothetically described in reference to the likely effects of the legislation before you are now already on Hillsdale College's doorstep as a part of our present reality.

And yet that is at an institution which, as I say, has extended equal opportunity since before the Civil War, and it's at an institution where that record has never been questioned, in almost a decade of litigation with the Federal Government.

What will happen, of course, in this is the potential damage by turning students away who are dependent on that aid, as the price of preserving our independence from Government control, and thereby a threat to narrow the very conditions of equal educational opportunity which the legislation purports to defend.

Speaking again simply, though, for one very small college, I can state that Hillsdale is determined to press on, that neither the court ruling nor the proposed legislation will weaken either our stand for equal opportunity, nor our insistence upon institutional independence. The legislation before these subcommittees may pass or it may fail passage. Based on the election year mood that now seems to prevail, I'm not sanguine that the legislation will be rejected, but we at Hillsdale hope to make it clear by our example that there is at least one other alternative path, the principle of private independence from public intervention, even if under attack in the courts and the Congress, can still find ultimate defense in the marketplace.

There is a defense to which Hillsdale will turn if our next round of rejection of title IX compliance forms makes it necessary. We intend to make enrollment at Hillsdale accessible to students of every economic background, men and women, whatever their racial qualification, or none, in our case, and we wish to do this, if necessary, with the sole support of dollars from the private sector, the source, in fact, ultimately, of all productive capacity in American society.

I suppose what I'm saying is that the question ultimately comes down, and this perhaps is what you are discussing here in this legislation, to what sort of society do we want. If we have no objection to a directed and regulated social order, then there should be no objection to a bureaucracy that controls that social order, makes its decisions administratively, often rather than by public consent in legislative chambers. There can be no doubt that in the course of using its powers to discriminate against all alternative philosophies and all alternative ideas of service, we are being given exactly what a centrally regulated and directed society always produces.

So, we really can't object to the process in health care, in education, anywhere in our social order, if that is what we want. I admit, no complaint can be made if what we want is a directed and regulated social order. But if, on the other hand, we seek a society in which men and women are free to make their own decisions, irrespective of their sex or their race, and have the right to choose institutions and services which are compatible with their own deeply-held convictions, then we must sharply limit the power of Government regulatory agencies and put that power back in the hands of individual American citizens.

So, the real question is just what do the American people want, to lead their own lives and make their own decisions, or to be controlled by a central bureaucracy who will make those decisions for us?

I believe the answer to that question is self-evident. Certainly at Hillsdale we intend to have one small example in which that private sector answer is available. Meanwhile, I urge on the same grounds that the committees before me act unfavorably on the misconceived, misnamed, and dangerous legislation now before them.

I thank the chairman for the opportunity to appear before you and I certainly welcome any question on any part of what I've said.

Mr. EDWARDS. Dr. Roche, that's very impressive testimony. We will reserve questions until Mr. Hafen has testified.

[Prepared statement of Bruce Hafen follows:]

PREPARED STATEMENT OF BRUCE C. HAFEN, PRESIDENT, RICKS COLLEGE, AND PRESIDENT, AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES

Mr. Chairman, I am here in two capacities—as President of Ricks College in Rexburg, Idaho and as President of the American Association of Presidents of Independent Colleges and Universities. I appreciate the opportunity to be here.

Ricks College is a private two-year college enrolling about 6,500 students. AAPICU includes the presidents of some 165 private colleges and universities from all across the country, representing a total enrollment of about 350,000 students. Some of these universities are large, such as Baylor, Villanova, and Brigham Young. However, most are small colleges with enrollments under 2,500. Many of our schools are church-related. All are deeply committed as a matter of conscience to the goals of nondiscrimination and equal opportunity in higher education. AAPICU is also committed to high standards of academic excellence; several of our member schools were given high marks in the recently reported poll from U.S. college presidents in U.S. News & World Report.

Many AAPICU colleges receive no direct federal aid, though nearly all have, until now, admitted students who were receiving educational assistance. In general, the member institutions of AAPICU are distinguished from other private colleges and universities by their determined efforts over many years to finance their own operations from the private sector. A principal motivation for this self-reliance has been an intense desire to remain independent of governmental control, in order to pursue distinctive educational missions. How ironic it is for these college presidents to realize today that, if H.R. 5490 is passed, they will be as completely overwhelmed by the collective cloak of regulation as if they had applied for maximum possible federal aid over all these years.

Before the introduction of H.R. 5490 and before the Supreme Court handed down Grove City, I believed my own college was not subject to campus wide Title IX coverage. I had two bases for this view—the "recipient" and the "program specific" requirements of the Title IX statute. The college had always refused every form of federal aid, and my own legal training convinced me that student aid alone did not make the college a recipient of federal funds. The "benefit" an institution receives through aid to its students is more like such indirect benefits as tax credits and tax exemptions than it is like direct federal grants for which there is a quid pro quo. In Grove City, the Supreme Court held that enrollment of students receiving federal aid made the College a "recipient" of assistance, though it did also uphold the statute's program specific concept. Now H.R. 5490 would eliminate that concept as well. The Court's decision and this Bill thus combine to force an impossible choice on schools like mine.

We have only two options, neither of which is desirable. Option A is to refuse admission to students receiving any form of federal aid. One result of this option is that students from disadvantaged backgrounds could not afford to attend since they may require substantial aid. We could try to raise our own student aid funds, but our costs—because we bear them ourselves—have already priced many of us out of the market. Competing with increased governmental aid to students is simply impossible. Surely the members of your committee are aware that private higher education is, largely for financial reasons, already among the most endangered of species. The most serious potential result of Option A is that the ineligibility of all students receiving government aid would sharply reduce enrollments in an already declining market, thus forcing through lost tuition income the closure of some private colleges. It is not at all unrealistic, therefore, to suggest as a possible subtitle for H.R. 5490, "the bill to terminate private higher education."

Option B is to accept the full blown umbrella of federal regulations across the entire campus. This prospect would force some schools into an intolerable compromise with their very reasons for existing. But, some will say, "better fed than dead." Option B also portends serious national economic consequences, because major contributions from the private sector will regret the loss of private education's distinctive educational character and hence lose interest in supporting it. Moreover, private colleges will themselves have far less incentive to seek help from private sources. It will be all too easy to line up at the federal pay windows, since nothing is gained by staying away. The aggregate reduction of private sector support for the staggering costs of national higher education under these circumstances should not be taken lightly.

Consider now a few of the major specific problems with the assumptions and the broad language of H.R. 5490. First, the Bill almost seems to assume there are no other civil rights laws in place to protect the interest of non-discrimination in the field of education. However, all private institutions are subject to Title VII of the Civil Rights Act, prohibiting discrimination in employment. These institutions are also subject to numerous other statutes affecting all employers. In addition, a variety of private legal remedies are arising to enforce non-discrimination rights.

Second, I stress that the occasion for your committee's current deliberations is not that new evidence of discrimination or lack of actual commitment to civil rights has been found on American campuses. There was no allegation or charge of discrimination in Grove City. The case dealt only with matters of statutor definition and congressional intent.

Third, while the expansive definition of "recipient" in H.R. 5490 reflects an understandable desire to eliminate all potential discrimination the trouble with such limitless terms is that they become meaningless and impossible to enforce. Under this definition, would a social security beneficiary attending a private college cause the college to be a recipient of federal aid? How about a student who pays his tuition with earnings from a summer job on a federally funded highway construction project? These are not far fetched questions, since in both cases the school is as much a "transferee" of federal funds through an "entity or person" as is the case in explicit student aid programs.

Fourth, the broad sweep of both the "recipient" definition and the concept of following every federal dollar through numerous potential recyclings of economic ripple effects reflects a risky form or overkill. This Bill conveys little sensitivity to its potential impact on either federalism or the private sector. Actually, there is currently great need to clarify the limiting clauses of the original Title IX language. For example, federal regulatory authority under either the Commerce power or the spending power is limited as soon as it enters an area pervaded by critical First Amendment values such as religious liberty and academic freedom. Thus, there is a qualified but terribly important exemption in Title IX when application of the law "would not be consistent with the religious tenets" of "a religious organization" which "controls" an educational institution. However, many colleges and universities in our Association which have strong institutional commitments to religiously based moral values are not protected by this exemption, because they are not formally "controlled" by a religious organization.

Being more specific about inappropriate invasions of religious and moral values, current Title IX regulations require schools to be blind to the occurrence of abortion in decisions relating to school policies or student discipline. Yet many religiously oriented institutions believe abortion to be serious moral wrong.

Also, the regulations establish an official orthodoxy about value questions relating to the roles of the sexes in society, matters of sexual morality, and attitudes about marriages and family life. It is not at all clear, for instance, whether Title IX permits college teachers and counselors to talk with students about ways in which marriage may be compared to career choices. It is unclear whether dress codes are allowed when they encourage gender-based appearance. Sex-segregated housing for single students is allowed up to the point of maintaining "separate living facilities." But the language is uncertain enough to make it difficult for institutions to know how to govern their affairs in a highly sensitive area.

Title IX does not recognize religious or moral principle as a basis for legitimate distinctions based on gender, unless the college is controlled by a church. And even then, the burden of proof seems to be on the college to convince the Department of Education that its religious interests are genuine. Because this procedure leaves doctrinal determinations in governmental hands, its constitutionality as well as its wisdom is questionable.

Fifth, the cause of higher education in this country is badly served by measures that destroy our system's few remaining vestiges of diversity and pluralism. As long ago as 1971, the distinguished Report on Higher Education prepared by the Newman Commission and distributed through the US Office of Education observed as its basic criticism that our "system of higher education as a whole is now strikingly uniform." The Commission found that college students have a choice "not . . . between institutions which offer different modes of learning, but between institutions which differ in the extent to which they conform to the model of the prestige university. . . . If . . . one believes that an important function of the higher education system is to offer alternative models of careers and roles, including those which challenge and change society, then the homogenization of higher education is a serious problem." For students who will be frozen out of private colleges unable to admit anyone receiving personal federal aid, the message of this report is particularly unsettling.

A final reason for concern about the effects of the proposed Bill on the predominantly small and financially self-reliant schools of AAPICU is that their limited resources make it virtually impossible to add a new campus-wide layer of personnel and procedures to satisfy the extensive compliance burden thus placed upon them. Their only answer may be to ask for federal funding to cover compliance costs. Then not only do national educational costs increase, but the claim that these schools are turly independent of the federal government really is destroyed—not because the schools are dependent on government for educational purposes, but because they are dependent on government to satisfy the government's purposes.

For the foregoing reasons, Mr. Chairman, I urge the Committee not to move hastily on this far-reaching legislation. I also urge that a way be found to protect the imperiled interests of colleges receiving no direct federal assistance. Thank you.

STATEMENT OF BRUCE HAFEN, PRESIDENT, RICKS COLLEGE, REXBURG, ID, ON BEHALF OF THE ASSOCIATION OF INDEPENDENT COLLEGE AND UNIVERSITY PRESIDENTS

Mr. HAFEN. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Bruce Hafen is president of Ricks College, on behalf of the Association of Independent College and University Presidents. I am going to have to leave for a few minutes but I will be back. We have to make up a quorum for a vote in another subcommittee and I am going to ask the gentleman from Illinois, Mr. Hayes, to take over the chair for that period of time, and Mr. Hafen, you're welcome and you may proceed.

Mr. HAFEN. I am here in two capacities, as was mentioned, president of Ricks College in Rexburg, ID, and as president of the American Association of Presidents of Independent Colleges and Universities. I appreciate the opportunity to be here and testify.

Ricks College is a private, 2-year college, enrolling about 6,500 students. The association I represent includes the presidents of some 165 private colleges and universities from all across the country, representing a total enrollment of about 350,000 students. Some of these universities are large ones, such as Baylor, Villanova, and Brigham Young. However, most are small colleges with enrollments under 2,500, one of which is Hillsdale College, whose president we have just heard.

Many of our schools are church related. All are deeply committed, as a matter of conscience, to the goals of nondiscrimination and equal opportunity in higher education. APPICU, our association, is also committed to high standards of academic excellence. Several of our member schools were given high marks in the recently reported poll from college presidents in U.S. News & World Reports.

Many APPICU colleges receive no direct Federal aid, though nearly all have, until now, admitted students who were receiving educational assistance. In general this is a point that's important for the committee to understand, Mr. Chairman, where our association comes from and who we are.

The member institutions of APPICU are distinguished from other private colleges and universities by their determined efforts over the years to finance their own operations from the private sector. A principal motivation for this self reliance has been an intense desire to remain independent of governmental control, in order to pursue distinctive educational missions. How ironic it is for these college presidents to realize today that if H.R. 5490 is passed, they will be as completely overwhelmed by the collective cloak of regulation as if they had applied and received maximum possible Federal aid over all these years.

Before the introduction of H.R. 5490, and before the Supreme Court handed down its *Grove City* opinion, I believed that my own college was not subject to campus-wide title IX coverage. I had two bases for this view, the recipient and the program-specific requirements of the title IX statute. The college had always refused every form of Federal aid, and my own legal training convinced me that student aid alone did not make the college a recipient of Federal funds.

The benefit an institution receives through aid to its students is more like such indirect benefits as tax credits and tax exemptions than it is like direct Federal grants for which there is a quid pro quo. I might insert parenthetically that is one reason why this is a highly dangerous bill, Mr. Chairman, because it will move us closer to the day when tax exemptions could be challenged on the grounds that they, too, are indirect subsidies which would bring every private organization under the country within the supervision of the Federal Government which previously had been reserved for control only under the spending power, as traditionally understood. I don't know that the import of that point has adequately been grasped.

In the *Grove City* case, the Supreme Court held that enrollment of students receiving Federal aid made the college a recipient of assistance, though the court also upheld the statute's program-specific concept. My own view about that, by the way, is that the Supreme Court was reaching what it might have thought would be something of a compromise and, for that reason, didn't look as closely at the recipient issue as it did the program-specific issue. Had it looked closely, more would have been found, I believe.

But now this bill would eliminate the program specific as well. Thus the Court's decision and this bill combine to force an impossible choice on schools like mine and on the other 164 schools for whom I speak today.

We have only two options, neither of which is desirable. Option A is to refuse admission to students receiving any form of Federal aid. One result of this option is that students from disadvantaged backgrounds could not afford to attend, since they may require substantial aid. I think Congressman Garcia's point is very well taken. He has recognized that issue.

We could try to raise our own student aid funds, but our costs, because we bear them ourselves have already priced many of us out of the market. Competing with vast sources of increased governmental aid to students is simply impossible.

Surely, the members of your committee are aware that private higher education is, largely for financial reasons, already among the most endangered of species.

The most serious potential result of this option A, refusing to admit students who are on Federal grants, is that the ineligibility of those students would sharply reduce enrollments for us in an already declining market of enrollments, thus forcing, through lost tuition income, the closure of some private colleges. It is not at all unrealistic, therefore, to suggest as a possible subtitle for this bill, "The bill to terminate private higher education."

Option B, our other choice, is to accept the full blown umbrella of Federal regulations across the entire campus. This prospect would force some schools into an intolerable compromise with their very reasons for existing, but some will say, "Better fed than dead."

Option B also portends serious national economic consequences because major contributions from the private sector will regret the loss of private education's distinctive educational character and, hence, they will lose interest in supporting it. Moreover, private colleges will themselves have far less incentive to seek help from private sources. It will all too easy to line up at the federal pay windows since nothing is gained by staying away. The aggregate reduction of private sector support for the staggering costs of national higher education under these circumstances should not be taken lightly.

Consider now a few of the major specific problems with the assumptions and the broad language of H.R. 5490. First, the bill almost seems to assume there are no other civil rights laws in place to protect the interests of nondiscrimination in the field of education. However, all private institutions, including educational ones are subject to title VII of the Civil Rights Act prohibiting discrimination in employment.

These institutions are also subject to numerous other statutes affecting all employers. In addition, a variety of private legal remedies are arising to enforce nondiscrimination rights.

Second, I stress that the occasion for your committee's current deliberations is not that new evidence of discrimination or lack of actual commitment to civil rights has been found on American campuses. On the other hand, I find it remarkable that we were told earlier by one of the witnesses who has followed the course of investigations for 10 years—there has not been an instance where funds have been cut off. So the problem is not a need for more enforcement to solve growing problems.

There was no allegation or charge of discrimination in *Grove City*. The case dealt only with matters of statutory definition and congressional intent.

Third, while the expansive definition of "recipient" in the proposed bill reflects an understandable desire to eliminate all potential discrimination, the trouble with limitless terms is that they become meaningless and impossible to enforce. Under this definition, for instance, would a social security beneficiary attending a private college cause the college to be a recipient of Federal aid? How about a student who pays his tuition with earnings from a summer job on a federally funded highway construction project? These are not farfetched questions since in both cases the school is as much a transferee of Federal funds through an entity or person, to use the terms proposed for the statute, as is the case in explicit student aid programs.

Four, the broad sweep of both the recipient definition and the concept of following every Federal dollar through numerous potential recyclings of economic ripple effects, reflects a risky form of overkill. The bill conveys little sensitivity to its potential on either federalism or the private sector.

I might add the original language of title IX reflected far greater sensitivity to the other interests in this country and in that sense was more thoughtful legislation and more workable.

There is actually current need now to clarify the limiting causes of the original title IX language based on experience since the bill was passed. For example, Federal regulatory authority under either the commerce power or the spending power is limited under constitutional octrines as soon as it enters an area pervaded by critical first amendment values, such as liberty and academic freedom. There is, for that reason, a qualified, but terribly important exemption in title IX when application of the law, quote, "would not be consistent with the religious tenets of a religious organization which controls an educational institution." That's language from the existing law.

However, many colleges and universities in our association and elsewhere in the country which have strong institutional commitments to religiously based moral values are not protected by this exemption because they are not formally controlled by a religious organization. Being more specific about inappropriate invasions of religious and moral values, current title IX regulations require schools, for instance, to be blind to the occurrence of abortion in decisions relating to school policies or student discipline. Yet, many religiously oriented institutions believe abortion to be a serious moral wrong. Also the regulations establish official orthodoxy about value questions relating to the roles of the sexes in society, matters of sexual morality, attitudes about marriage and family life.

It's not at all clear, for instance, whether title IX permits college teachers and counselors to talk with students openly about ways in which marriage may be compared to career choices. It's unclear whether dress codes are allowed when they encourage gender-based appearance. There was one court decision on that issue, but to seek Federal court clarification of every small point under a statute is not an encouraging prospect. Sex-segregated housing for single students is allowed up to the point of maintaining separate living facilities, but the language is uncertain enough to make it difficult for institutions to know exactly how to govern their affairs in a highly sensitive area.

Title IX does not recognize religious or moral principle as a basis for legitimate distinctions based on gender unless the college is controlled by a church and even then, the burden of proof seems to be on the college to convince the Department of Education that its religious interests are genuine. Because this procedure leaves doctrinal determinations in governmental hands, its constitutionality, as well as its wisdom, is questionable.

Fifth, the cause of higher education in this country is badly served by measures that destroy our system's few remaining vestiges of diversity and pluralism. As long ago as 1971, the distinguished Report on Higher Education prepared by the Newman Commission and distributed through the U.S. Office of Education, observed as its basic criticism that our system of higher education in the United States as a whole is now strikingly uniform. The Commission found that students have a choice, quote:

> Not between institutions which offer different modes of learning, but between institutions which differ in the extent to which they conform to the model of the prestige university.
>
> If one believes that an important function of the higher education system is to offer alternative models of careers and roles, including those which challenge society, then the homogenization of higher education is a serious problem.

For students who will be frozen out of private colleges unable to admit anyone receiving personal Federal aid, the message of this report is particularly unsettling.

Now a final reason for concern about the effects of the proposed bill on the predominantly small, and financial reliant schools of AAPICU, is that their limited resources make it virtually impossible to add a new campus wide layer of personnel and procedures to satisfy the extensive compliance burden thus placed upon them. Their only answer may be to ask for Federal funding to cover compliance costs. Then, not only do national educational costs increase, but the claim that these schools are truly independent of the Federal Government really is destroyed—not because the schools are dependent on Government for educational purposes, but because they are dependent on Government to satisfy the Government's purposes.

For the foregoing reasons, Mr. Chairman, I urge the committee not to move hastily on this far-reaching legislation. I also urge that a way be found to protect the imperiled interests of colleges receiving no direct Federal assistance.

Thank you.

Mr. HAYES. I want to thank both of the witnesses for their testimony. You're suggesting by your final remarks not to move hastily or you suggested that we move with deliberate speed or something of that sort to rectify what is wrong.

Mr. HAFEN. I guess I take a cue from what Mr. Erlenborn said earlier. The process of making legislation is an extremely significant process. I can't imagine one much more significant. For that reason, on a bill of this significance, to be careful seems to me very wise and very necessary and it's difficult to be careful when we're hurrying.

Mr. HAYES. Is it your testimony that all 164 schools which you represent will decline to accept students receiving Federal financial assistance?

Mr. HAFEN. No; I have not had an opportunity to contact that many schools. That's part of the problem with hurrying this fast. It takes time to find out exactly what the impact would be with so many different schools. Some would decline. President Roche of Hillsdale—that's a member of our association—has already stated his view. I understand the president of Grove City feels similarly. They are a member of our association as well. I am sure that not all of them would take that view because there are some who receive enough other financial assistance beyond student aid that they are not likely to take that view. But a substantial number, I suspect, would consider the possibility very seriously.

Mr. HAYES. Is it, Mr. Roche, your position that there should be a distinction in the law that is being proposed in the application to private institutions versus institutions who survive on public funds? Do you think that the proposed bill is necessary for those State-supported or federally supported institutions as opposed to not necessary for private institutions? Is that what you are saying?

Dr. ROCHE. Well, my principal concern here, of course, is to speak from the perspective that I know best of privately funded higher education and my principal concern with the bill, above all others, is this application of indirect aid, because once that peculiar definition of the word—back to what Congressman Erlenborn said earlier—this odd use of words—do we mean aid or don't we mean it on how many times removed does it have to be? Once we are in those definitional problems, there are risks not only in education, but in society as a whole, spreading Federal authority to areas where I think it is no one's intention that that authority be spread.

As to public institutions and their role in this, I am probably perhaps the least qualified person in the country to speak on that. I say that with some self-satisfaction. I am not being facetious. I really don't have an idea. My testimony has not addressed public institutions and what they should do.

Mr. HAYES. You will admit though that there have been instances of discrimination even in private institutions against women, against handicapped, against minorities.

Dr. ROCHE. I will admit that within the diversity of a system as large as the one operating in this country, there are all sorts of definitions of what actually is happening and even what constitutes discrimination. I hope this bill, in turn, if it should be passed, will admit that there are substantial areas of the private sector, which with no government help and no government control, do not discriminate and, in fact, never have.

Mr. HAYES. Mr. Erlenborn.

Mr. ERLENBORN. Thank you, Mr. Chairman. Mr. Chairman, earlier you asked a question of me designed to elicit an answer as to whether I supported this legislation or not and I said that I tried to come here with an open mind to listen to the witnesses instead of coming here with my mind already made up.

Mr. HAYES. Don't close it now. [Laughter.]

Mr. ERLENBORN. I am going to keep it open. I would like to note for the record, however, that out of the many members—I don't know exactly how many—that constitute the two committees—the two subcommittees that are conducting these hearings—during most of the testimony of these two witnesses we have had two members, we now have three present. It reminds me of a colleague of mine who some years ago I noted was not attending committee meetings. I said, "John, why don't you go to the committee meetings?" He said, "Oh, hell. My mind is made up. I don't want to be confused by the facts."

I think that may be the case here today. As I mentioned earlier, the words seems to be out—"No amendments. Pass this bill as quickly as possible." Apparently without consideration of the views of the witnesses as well as without the opportunity to effectively amend the legislation. I think that's unfortunate and I think it denigrates the legislative process.

You know, there are a lot of our members who are going to vote on this thinking the issue is civil rights, the issue is discrimination. There has been eloquent testimony here today that that's not the issue at all—because Hillsdale College and Grove City College, the subjects of the litigation, have never been accused of discrimination. So the effect of part of the Supreme Court decision extending the jurisdiction of the Federal Government under title IX to those and other such institutions is not to stop discrimination that exists or we fear will exist in the future, but merely to extend the massive, majestic power of the Federal Government to these institutions that have tried to remain private and unentangled.

It's not a civil rights issue. It really isn't. Because we are not affecting—at least from the testimony that we have heard here today and other testimony in the past—we are not affecting a cessation of already existing violations of civil rights nor are we protecting against proposed violations of those civil rights. There is no allegation that that has occurred or will occur in the future. So it really isn't a civil rights issue and, yet, closing their minds, not listening to the testimony, heeding the admonitions that, "You will be disadvantaged politically if you appear to want to amend this legislation because you will be antirights," therefore, we are just going to see this bill go rolling through and people voting for it on some mistaken assumption. I guess they don't want to have clarity brought to their thinking so they don't even bother to come here and listen to the witnesses.

I want to applaud the stand that you two have taken and the other independent institutions that you represent. I think it's important that we have private institutions and I fear the kind of thinking that comes out of an office that would say, "Boy Scouts and Girl Scouts are sexist organizations and can't use public facilities." The same group that wants to extend their power to you said that in the past. With that kind of thinking and this tendency to make words mean what we want them to mean to achieve an end, I expect that one of the fears that you have for the future, is the reach will be extended to someone who worked for a project that had Federal funds and then pays tuition with those funds.

I don't think there's any way, if some of the radical proponents have their way, there's no way that you can remain private institutions. You are going to come under that massive, majestic power of the Federal Government.

So I think if some of those who would like to see this extension were completely honest, they would just do what I suggested earlier and pass legislation that clearly said it instead of having to go through the machinations and twisting of the meaning of words.

I don't think that was a question, but I'll ask you to respond if you care to.

Dr. ROCHE. That was very well stated, Congressman.

Mr. HAYES. I just want to say that this is the third day of the subcommittee hearing on this proposed legislation, H.R. 5490, and I believe my colleague here to my right—it's unfortunate that this is your first day being in here.

Mr. ERLENBORN. No; I think you're wrong, Charlie. You have made a little mistake here. I have been here before.

Mr. HAYES. Well, I didn't know if you heard the other witnesses with another view on this.

Mr. ERLENBORN. Yes; I have heard many of the witnesses and I have been here before and, let me say, that there have been some members of the two subcommittees who have not been here at all. At no time, when I was here have we had very many of the members in attendance. That's not unusual. Very often, unfortunately, in this legislative process, we cast our vote on the title of the bill rather than hearings. That's not unusual. It happens all too often.

Thank you, Mr. Chairman, for your kind consideration.

Mr. NIELSON. Mr. Chairman.

Mr. HAYES. Mr. Nielson.

Mr. NIELSON. I would like to apologize to Dr. Hafen. I had to go to Energy and Commerce to work on a comprehensive smoking education bill which was up right at this same time. They needed my vote at that particular vote. I did, however, hear Dr. Roche's testimony and I read yours. I want to commend you both for good testimony.

I would like to repeat, if I may, something you said, Dr. Hafen, which I think is very important. You said, "Under the definition"—that if a student gets aid that therefore is aid to the institution—that was, of course, what Dr. Oakes was fighting for several years as you know, at Brigham Young University—you state on page 4, "Under this definition, would a Social Security beneficiary attending a private college cause the college to be a recipient of Federal aid?" I think a broad interpretation would include that. "How about a student who pays his tuition with earnings from a summer job on a federally funded highway construction project"—or a forest service or anything else? I think that is Federal aid.

I think there isn't a family in this country that doesn't get Federal aid in one form or another. It could be low-income energy assistance. It could be weatherization. It could be social security in a broad sense. It could be almost anything. Who knows the source of the funds of the man who pays cash—for example, the student who pays cash? Who knows where those funds came from? His father might be a civil servant, for example, getting money from the Federal Government. I see all sorts of interpretations. You are going to have a field day in the courts and even if you, as administrators of Federal colleges, do not have any explicit Government aid in terms of federally guaranteed loans or things of this nature, I think you could trace Federal funds to almost every student to your doors and you would be under the umbrella.

So I asked the question of the gentleman here before, "Is your goal to extend Federal control over all colleges," and they both enthusiastically said, "Yes; that would be great to have it over all colleges."

I think you put your finger on a very important point, Dr. Hafen. I think we need to think very carefully on that. I think that's the aspect that concerns me most.

I am not concerned whether we change it from "program" to "institution." I think that would clarify it. That part of the bill doesn't bother me a bit. But I do think that it's extremely difficult to say what is Federal aid and what is not.

If my children go to college, since my funds come from the U.S. Congress, that's Federal aid in the broad sense. I think you'll have a lot of litigation on this and I think it's going to—as you said—both of you said—it's going to destroy private schools, it's going to destroy the incentive to contribute to private schools and basically it's going to line more people up at the Federal trough to get more Federal aid. I think it's a very great step backward in that sense.

So I think the bill naturally has to look at it and make sure that we know exactly what we mean by Federal aid to the student. If we don't define that extremely carefully, we could have chaos in our whole educational system.

Thank you, Mr. Chairman.

Did you want to respond to that?

Mr. HAFEN. I would just agree with you to this extent, Mr. Nielson and to other members of the committee, that you're quite correct, Mr. Erlenborn. This is not really a bill about civil rights. This is a bill addressing some very large issues. As I hear you talk and reflect myself, the issues loom even larger. We're talking here about whether the spending power could be used as the vehicle to transform this society from a pluralistic one based on free institutions with checks and balances into a monolithic society having characteristics really more resembling totalitarianism, where there is centralized control without checks and balances. Because spending power interpreted this broadly becomes a vehicle not to ensure accountability about how Federal funds are spent, but becomes a Trojan horse to establish monolithic value systems and ideas that are anathema to all of the ideas on which this system of Government is based.

I hope that the size of those issues will, at some point, be understood by those who must think about them.

Mr. NIELSON. Dr. Roche.

Mr. ERLENBORN. Would the gentleman yield?

Mr. NIELSON. Yes; I'll yield.

Mr. ERLENBORN. Just one observation on whether this is civil rights-related or not. Yesterday, I believe it was—the other day when we had former Senator Bayh here—I asked him if he could tell me—well, I made a statement and asked him to challenge it if he thought I was wrong—and that was that Grove City College had never been accused of having violated anyone's civil rights or practiced discrimination. He seemed shocked. I think he was unaware—I think he really believed that this was a civil rights issue and, with a flurry of consultation with his advisors behind him there in the row of seats, he finally answered without challenging my assertion that no one had ever accused the college of having practiced discrimination. But, as I say, he seemed to be quite unaware of that fact.

I think most everyone assumes that this case was over discrimination and that this legislation is meant to attack existing discrimination that cannot be reached by the present law. Even the proponents seem very surprised when they find that that's not true.

Mr. NIELSON. Dr. Roche, go ahead.

Dr. ROCHE. The comments that both Mr. Erlenborn and Mr. Nielson have made prompt one additional reiteration on my part. The issue is clearly not discrimination. The issue is control. The kind of damage that you were describing—the terrific spread of a careless piece of legislation—a very wide application—is a clear and present danger in this case and it reminds me of a single sentence prophecy made earlier in this century by perhaps the most distinguished economist of his age, Joseph Schumpeter. He describes the future of our century—these are his words—"as a conquest of the private sector by the public sector." That century is well advanced and this piece of legislation fits that prediction.

Mr. NIELSON. I would like to commend the gentlemen. I, too, am sorry that this was not heard by the entire panel. Perhaps when we mark this up, we can bring that to their attention and mention some of the aspects of the bill which I think could be corrected, I think very simply, with a simple correction, and still accomplish what Mrs. Berry wanted—namely, to apply to the whole institution. I have no quarrel with that. If I am willing to take funds for my sociology department, I am saying Federal aid is OK. I accept the Federal responsibility along with that. But if I simply admit a student who doesn't have the means otherwise, who applies for the student guaranteed loan or a Pell fellowship or whatever, if I admit that student to my institution, I don't think that jeopardizes my role, I don't think that that should bring government into the operation of the institution.

Thank you, Mr. Chairman.

Mr. **Hayes**. Just let me express, too, my appreciation to the two gentlemen who have appeared before this subcommittee. I think you presented your points of view well and I want it clearly understood that we, as members of this subcommittee, didn't expect to have all views the same. We, too, realize that we are part of a society that's not monolithic. There were those who didn't agree in 1964 that the Civil Rights Act itself was necessary, and subsequent to that, there have been those that didn't agree that title IX was necessary in the first place or section 504.

I think, though, that our purpose here is to determine whether or not H.R. 5490 is necessary in order to correct what some feel has been a weakening of these statutes that are now on the books. I hope that in this session of Congress we will have an opportunity to address ourselves in a legislative way to this proposed bill.

I really want to say and I am sincere when I say this—that you have presented excellent testimony and it will be entered into the record in its entirety. I am sure that you will find that your views are shared by others within the House of Representatives, as you might expect, and yes, there will be opposition to your views, as has been expressed by witnesses here before this committee.

But I want to close by saying, "Thank you for coming." This concludes our hearing for today.

[Whereupon, at 11:07 a.m., the joint session was adjourned.]

[Material submitted for inclusion in the record follows:]

Berea College,
Berea, KY, May 8, 1984.

Mr. Carl D. Perkins,
Rayburn Building,
Washington, DC.

Dear Mr. Perkins: I am writing to encourage you to oppose HR-5490 and Senate Resolution 2568. These bills would do two things which would be very harmful to the independence of colleges and universities around the country.

First, they would broaden to the ultimate limit the definition of a "recipient institution" to include those where federal funds were received directly but also include those where federal funds were received through another person or entity. If the Federal Arts Commission gave money to the Kentucky Arts Commission, who in turn made a grant to Berea College, we would be required to live up to all federal standards even though the money came indirectly. In some instances we would receive federal money which we would not even know we were receiving. Secondly, if our Department of Chemistry received a federal grant, every department in the college would be required to act as if it had also received federal funds. This was not the intent of the original legislation and the legislative history in committees shows that this was not the intent.

I recognize that in this era of single issue politics there are some who would wish to control all institutions in the country toward their own particular ends. I would argue that a greater degree of latitude for institutions to run their own programs and policies and to have their own goals is much preferable in a free society. I am all for women's rights but I am not for them at the cost of seriously eroding the independence of every educational institution in the United States. Some freedom for our educational institutions to follow their own goals is extremely important to our society and that freedom should be denied only for the most urgent public purposes.

I hope that you will oppose this legislation. This brings you best wishes.

Yours sincerely,

WILLIS D. WEATHERFORD.
OFFICE OF THE PRESIDENT.

THE UNIVERSITY OF KANSAS,
OFFICE OF AFFIRMATIVE ACTION,
Lawrence, KS, April 11, 1984.

Hon. JIM SLATTERY,
Longworth House Office Building,
Washington, DC.

DEAR REPRESENTATIVE SLATTERY: I appreciate the opportunity to give you direct input regarding the potential effect of the Grove City decision on our institition, the University of Kansas. I am sorry for the delay in responding to you and hope that my response will still be of use to you.

Without court interpretation on non-Title IX equal opportunity and affirmative action programs, anticipated effects remain speculation. I, like you, am reading everything possible on the topic. As expected, the Department of Education Office of Civil Rights (OCR) has made the decision not to assume jurisdiction in some cases in spite of known sex bias. This administrative decision may have the most immediate effect on KU.

At the University of Kansas the legal interpretation of the Grove City decision will ultimately be the responsibility of the Office of the General Counsel, unless the Board of Regents request an opinion from their attorney. The function of KU's general counsel's office and that of my office, the Office of Affirmative Action, are different so it is not uncommon for our offices to take opposing positions on matters of interest to my office.

KU does have a policy against most forms of discrimination, and the Kansas Act against discrimination provides limited protection in some of the same areas as the KU policy. There are a number of federal statutes that provide protection against status discrimination. In the last year five complaints that were not solved by internal grievance or hearing procedures were appealed to the Kansas Commission on Civil Rights, EEOC and OCR. OCR would not have taken jurisdiction in the appeal filed in a student sexual harassment case under the post Grove City interpretation by OCR. She would have been left with no forum after using our procedures.

The immediate effect upon this office is that we must warn students who initiate a complaint that their right to also file with OCR is now uncertain unless the program included in the complaint is a direct recipient of federal funds. It may be incumbent upon the complainant to investigate and prove that federal dollars directly touch the program. This will have a chilling effect upon all but a hearty and persistent complainant. Generally, the experience of complainants at KU is that they suffer from emotional trauma because of the perceived discrimination and that they have limited financial resources which may limit their ability to obtain legal assistance in bringing forth an internal complaint. The University, on the other hand, has a staff of three attorneys who are obliged to represent anyone who represents the interests of the University, often the respondent in a complaint. There is an inherent imbalance that may be activated by a respondent to the complaint.

If OCR makes the complainant present evidence of direct federal dollars, which would not be an easy task, the complainant may give up rather than face another barrier if they go to OCR as an alternative or after exhausting the internal procedure.

The major federal anti discrimination protection my office uses is Executive Order 11246 which is administered by the Office of Federal Contract Compliance Programs. Affirmative action and equal opportunity are part of the mandated policies KU, as a recipient of federal contract dollars, must provide. The most drastic, albeit questionable, interpretation of 11246 might be that only programs which are direct recipients of federal dollars would need to provide equal opportunity and have an affirmative action plan. That type of segregation would be costly and difficult to monitor and would have a negative effect on the cohesiveness and collegiality that KU enjoys.

I believe some programs, such as the Athletic Association, have resisted being included in KU's affirmative action plan and intend to seek a restrictive interpretation of the Grove City decision to exempt them from the jurisdiction of KU's Office of Affirmative Action. Such an interpretation would be problematic because athletics would be "privileged" through exemption. Currently efforts are being made by both academic and athletic interest for a better understanding between the two for the sake of the students involved.

I have attached for your information an analysis done by Dan Dutcher, the legal researcher in this office. I hope it will be of use to you.

Please feel free to call me if I can clarify any of my ideas or if you have specific questions you may wish me to address. If you are ever in the area please drop in to say hello. I certainly appreciate your efforts that support the principles that my office attempts to uphold and would appreciate being kept informed of the progress of your legislation.

Sincerely,

Robbi Ferron, *Director,*
Office of Affirmative Action.

Attachment.

Implications of Grove City: Title IX

Various educational and legal experts have attempted to predict how Grove City will affect higher education in terms of Title IX. This section summarizes the main arguments available on this issue through review and critique of arguments found in the article by Cheryl Field in CHE 3/14/84, p. 24.

1. The peculiar fact pattern involved will limit the applicability of Grove City.

Grove City College severely limited the form and destination of the federal money it accepted, and the Court relied heavily on this fact in its decision. 52 LW 4287–8. By contrast, most universities accept a broad range of federal financial aid devices, and federal dollars permeate through most university programs and activities. Thus, Title IX remains effective through the funding practices of most universities.

Critique: Grove City leaves Title IX too dependent on the enforcement perrogatives of OCR, state, and university officials.

Note that this argument has two basic assumptions. One assumption is that administrative complication will prevent most educational institutions from conducting the analysis or administrative reorganization necessary to take advantage of the Grove City holding by purposely making university subunits free of federal funding. This premise might underestimate both the ability and the desire of university administrators to identify federal financial assistance on a program or activity basis, and to purposely organize or reorganize particular programs or activities to be void of federal funding.

Analysis of the second premise supports the rejection of the first. Argument #1 assumes that OCR will continue to broadly define "program or activity" and actively enforce that broad definition to the greatest extent permissible under Grove City. However, OCR's recent decision to drop its discrimination investigation at the University of Maryland contradicts that assumption. See Field. CHE 3/21/84, p. 1,16. In that case, although OCR found disparities between the Maryland men's and women's athletic programs in competitive opportunities, meal allowances, travel, locker room facilities, recruitment, and support facilities, OCR dropped the case because it found no disparities in the handling of athletic financial aid and scholarships, the athletically, related area which received federal funds. Note that the case set the apparently narrow precedent by which OCR will enforce Title IX in the future. In all fairness, OCR's extremely narrow definition of "program or activity" in the case is entirely understandable, given the fact that the Court seemingly went out of its way to rule accordingly in Grove City. See 52 LW 4290, Stevens, dissenting.

2. Various other anti-discriminatory regulations will adequately offset the impact of Grove City on Title IX.

This argument contends that, regardless of the applicable federal law, various antidiscriminatory state laws and university policies will adequately prevent sexual discrimination in higher education. Individuals who suffer discrimination can sue for violation of state law, look for redress through the university system, or even sue the school for breach of contract under the theory that their institution made an implied contract with the individual to enforce anti-discriminatory policies. Activists are especially likely to pursue these alternatives.

Critique: State or institutional redress is an inadequate alternative to Title IX.

The existence and intent of such state and university regulations is not questionable. The Kansas Act Against Discrimination (KSA 44-1001 et seq.), Kansas Executive Orders 80-47 and 82-55, and the University of Kansas' Affirmative Action Policy are all fine examples of non-federal anti-discriminatory legislation. The

Kansas Commission on Civil Rights and the KU Office of Affirmative Action diligently enforce these regulations.

The ability of such laws and policies to effectively combat sexual discrimination in the post-Grove City world is questionable. The premise of argument #2 is that state and university institutions such as the Commission on Civil Rights and OAA, or that individual complainants, possess adequate resources and administrative support to pursue sexual discrimination remedies. However, it seems unreasonable to expect such institutions or individuals to allocate the amount of money, time, and desire required to fill the enforcement gap created by Grove City, especially in light of the Maryland case. Thus, enforcement may suffer without a commitment of federal resources and leadership, despite strong anti-discriminatory state and institutional regulations.

3. Fiscal and demographic trends will severely limit the long-term effect of Grove City on institutions of higher learning.

This argment has two parts. One is the idea that, due to Reaganomics, taxpayer revolt, and budgetary retrenchment, the fiscal future of universities will remain indefinitely insecure. Any "Golden Age" of university funding is presumed past. Second is the idea that, due to population trends, future university administrators will face a more limited student pool. Together, these factors will supposedly spur so much competition among universities for potential students that universities will be forced to participate in federal funding programs to an ever greater extent, due to fiscal necessity. Thus, whatever, negative impact Grove City has on higher education will be shortlived.

Critique: Grove City ignores the fact that negative impacts need not be long-term to be significant.

The demographic and fiscal assumptions of this seem reasonable, although they may turn out suspect. However, this argument also implies the same assumptions as arguments 1 and 2: that future OCR, state, and university efforts will effectively preclude and redress instances of sexual discrimination. Although all of these assumptions may be questionable, university enforcement efforts seem especially suspect, since the Grove City and Maryland cases suggest that a university could prospectively earmark the destination of its government funds to avoid triggering Title IX. Hence, this argument falls prey to the same threats to enforcement that are found in critiques 1 and 2. Moreover, argument #3 assumes that an impact that is only temporarily discriminatory cannot be significant.

CONCLUSION

In conclusion, the full effect of Grove City on Title IX is unclear, and is likely to remain so for the immediate future. OCR, state and university regulations, stare decisis, and fiscal and demographic trends may all significantly limit the implications of the case. However, these factors appear to present alternatives that are significantly weaker than Title IX.

Perhaps the most important implication to emerge so far is the reserved attitude OCR has adopted regarding Title IX investigations, reflected by the Maryland case. In the words of Ms. Donna E. Shalala, president of Hunter College of the City University of New York:

". . . it is always better to have a clear, firm federal directives in the area of discrimination. It sets a ground floor for what additional things states and institutions themselves may do. Providing (such) leadership is exactly when you get results. (Grove City, when consiered with the Reagan administration's actions to limit the application and enforcement of civil rights law, is troublesome) not because they necessarily send a message in favor of discrimination, but because they say that elimination sex bias is no longer a priority for the federal government." (Fields, CHE 3/14/84, p. 14).

Implications of Grove City: Section 504 and Title VI.

Grove City could significantly alter the status of Section 504 and Title VI in higher education. Section 504 of the Rehabilitation Act of 1973 forbids discrimination against the disabled in federally assisted education programs. Title VI of the Civil Rights Act of 1964 prohibits bias on the grounds of race, religion, or national origin in federally assisted education programs.

At first glance, Grove City does not appear to affect Section 504 or Title VI because the decision is confined to an interpretation of Title IX. However, research reveals the fact that all three laws contain similar language. Fields, CHE 12/7/83, p. 19.

Thus, not only does Grove City delineate a program-specific standard for Title IX, Grove City also encourages executive agencies and lower courts to interpret and apply Section 504 and Title VI on a program-specific basis as well. For institutions of higher learning, the implications of Grove City for Section 504 and Title VI would probably parallel the implications for Title IX discussed above.

CONCLUSION

In conclusion, Grove City could significantly affect the gamut of federal equal rights legislation in force at institutions of higher learning. Directly, Grove City held that institutions, agencies, and courts should apply Title IX on a limited, program-specific basis. Indirectly, Grove City encourages a similarly narrow interpretive standard for Section 504 and Title VI. At best, the holding is factually limited, and shifts the burden of equal rights enforcement to state and institutional agencies. At worst, Grove City discouraged OCR and DOE from actively enforcing major federal equal rights legislation and encourages prejudical university administrators to limit the scope of such legislation by segregating federal financial aid. Again, the full effect of Grove City in this area is unclear, and is likely to remain so for the immediate future.

The legislative implications of Grove City are clearer. Faced with a hostile Court, a hostile executive, and potentially hostile university administrators, the amendment of Title IX, Section 504, and Title VI to specify institution-wide coverage is a legislative imperative from the standpoint of civil rights encouragement.

Note that Congress should amend all three equal rights laws. The similar language and subject matter of the three laws indicate that courts would severely limit any legislative effort falling short of an across-the-board amendment via negative implication. If Title IX alone were to be changed to provide institutional coverage, "it could later be argued that Congress did not intend the other laws to cover entire institutions," argues Jeanne Atkins of the Women's Equity Action League. She continues, "since the languge in the laws is identical, there (is) no logical way a separation (can) be made." Fields, CHE 3/14/84, p. 24.

PREPARED STATEMENT OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

This statement is submitted by the National Collegiate Athletic Association ("NCAA"), an association of 976 colleges and universities, allied athletics conference, associated institutions and affiliated organizations. The NCAA governs men's and women's intercollegiate athletics programs sponsored by its member institutions, conducts national intercollegiate championships for male and female student-athletes, and provides various other programs and services for both men and women.

This statement concerns one of the four statutes that would be amended by H.R. 5490—Title IX of the Education Amendments of 1972. For many years, ensuring equality of athletic opportunity for male and female student-athletes has been viewed as a primary objective of Title IX. The NCAA and its member institutions are fully and irrevocably committed to the achievement of that objective and have undertaken special efforts to enhance women's athletics.

GAINS BY WOMEN AT THE INSTITUTIONAL LEVEL

The opportunities available to women in intercollegiate athletics have grown dramatically. Women's college sports is often cited as the area in which the greatest progress has been made since the enactment of Title IX. At NCAA member institutions, the number of female participants in intercollegiate athletics increased from 32,000 in 1971-72 to 64,000 in 1976-77; and rose by 1982-83 to 80,000. Thus, in a period of 12 years, women's participation in intercollegiate athletics increased by 150%. The percentage of participants who were female also grew from 16% in 1971-72, to 27% in 1976-77, to 31% in 1982-83.

During the period from 1971 through 1982, the number of NCAA member institutions sponsoring various intercollegiate sports for women increased dramatically; for example:

	1971 (663 institutions)	1982 (753 institutions)
Basketball	307	705
Cross country	10	417

	1971 (663 institutions)	1982 (753 institutions)
Softball	147	416
Swimming	140	348
Tennis	243	610
Track and field	78	427
Volleyball	208	603

The average number of women's intercollegiate sports programs sponsored by NCAA member institutions grew from 5.61 in 1977, to 6.48 in 1980, to 6.9 in 1984.

Important gains also have been made in providing athletically related financial aid to female athletes. According to the National Advisory Council on Women's Educational Programs, in 1974, 60 colleges offered athletically related scholarships or grants to women; in 181, 500 provided such aid.

Notwithstanding rising costs and limited revenues, institutional budgetary allocations for women's intercollegiate athletics programs have increased significantly in all three divisions of the NCAA membership. In 1973, NCAA member institutions' aggregate expenditures for women's intercollegiate athletics were $4.2 million; in 1977, $24.7 million; in 1981, $116 million.[1] The average institutional budget for women's intercollegiate athletics in all divisions increased from $6,000 in 1971–72, to $34,000 in 1976–77 (an increase of 467%), to $155,000 in 1980–81 (an additional 356%). The most dramatic gains were in Division I, which had a 914% increase in the first period (from $7,000 to $71,000) and a further 376% increase in the second (from $71,000 to $338,000).

These increases have occurred even though the growth in revenues generated by women's programs has not kept pace in any approximate fashion with the expansion of those programs. The degree to which women's programs covered their own costs decreased from 34.3% of total costs in 1973 to 28.2% of total costs in 1981. Yet, member institutions remained committed to providing the resources needed to expand athletics opportunities for women, and the average financial contribution to women's programs by men's programs has increased.

GAINS BY WOMEN AT THE CONFERENCE LEVEL

In recent years, women's intercollegiate athletics opportunities also have increased markedly at the conference level. This year, 28 Division I conferences, 15 Division II conferences and 17 Division III conferences are sponsoring women's competition. At all divisional levels, the number of conferences sponsoring women's competition in specific sports is growing. For example, at the Division I level from 1982–83 to 1983–84, the number of conferences sponsoring women's competition in basketball increased from 25 to 28; cross country, 15 to 21; field hockey, 7 to 9; golf, 6 to 8; swimming, 15 to 17; tennis, 20 to 22; outdoor track, 16 to 18; indoor track, 7 to 10; and volleyball, 19 to 25.

GAINS BY WOMEN WITHIN THE NCAA

In 1981, the NCAA membership adopted a governance plan under which women were guaranteed representation on all of the committees responsible for conduct of NCAA affairs, and the various programs and services offered by the association were extended to women's intercollegiate athletics.

Currently, 187 women occupy 230 positions on NCAA committees. These women represent 143 NCAA member institutions. Thirty-one percent of all committee positions are held by women. Women serve on nearly all NCAA committee and, in fact, the number of women on administrative general, Convention and special committees exceeds established minimums designed to ensure representation based upon the ratio of female to male participants in intercollegiate sports. The ratio of participants will be reviewed periodically to determine whether established minimums for women are appropriate based on developments in the administration of and participation in women's athletics. During the 1982–83 academic year, the intercollegiate athletics participation ratio at NCAA member institutions showed 69.2 percent males and 30.8 percent females. The effect of the membership legislation (as described herein) adopted in 1982 and 1984 at NCAA Conventions, insuring a minimum number of sports to be offered for women without regard to participation ratios, should increase participation numbers for women and, as a part of that, additional opportunities for women for service on NCAA committees will be provided.

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[1] In 1973, excluding football, on average women comprised 20% of intercollegiate athletes and were allocated 3.4% of institutional intercollegiate athletics budgets. In 1983, excluding football, women comprised 37% of the athletes and received 20% of the budgets.

The number of women delegates attending NCAA Conventions has increased from 159 in 1981 to 318 in 1984. As a part of the governance plan, institutions were encouraged to send women delegates to the Conventions and a fourth individual was added to the Convention delegates listing (indentified as the primary woman athletics administrator) to insure this opportunity for women.

In 1981-82, the NCAA, at the direction of its membership, began offering intercollegiate championships for women. That year, the NCAA sponsored 29 women's championships in 13 sports. By 1984-85, the NCAA will sponsor 33 women's championships in 15 sports. Under policies adopted by the NCAA membership, these championships are financed on the same basis as men's championships except that in an effort to encourage the growth of women's sports, several exceptions to the championships policies for men have been allowed in the women's championships for the present.

The NCAA gurantees payment of the game and transportation expenses of its championships for both men and women regardless of the revenue-generating potential of those championships. To date, gymnastics is the only women's championship that has generated sufficient revenues to pay its own costs. Consequently, the NCAA subsidized 28 women's championships offered in 1981-82 (at a cost of $1.7 million) and 30 women's championships in 1982-83 (at a cost of $2.2 million). In 1982-83, NCAA expenditures for the 30 women's championships that were non-revenue-producing exceeded its expenditures for the 29 men's championships that were non-revenue-producing by 8.4 percent.

In addition, for the past three years, the NCAA has substantially increased the share of its promotional budget devoted to women's athletics. This share increased from 20% in 1981-82 to 34% for women in 1982-83, and this year women's athletics is receiving 49% of the total $709,200 promotional budget. A substantial portion of these funds has been earmarked for a special effort program aimed at increasing the visibility of women's basketball and women's gymnastics. This special effort includes allocations for feature stories on female athletes in print media, an annual press conference luncheon focusing on women's basketball, television coverage of women's sports and professional development seminars.

At the 1982 NCAA Convention, the NCAA membership adopted legislation (effective August 1, 1985) requiring all NCAA member institutions that affiliate their women's athletics program with the NCAA to sponsor at least four varsity intercollegiate sports involving all-female teams (in addition to four sports involving all-male teams or mixed teams of males and females). This rule is believed to be the first adopted by any athletics governance organization requiring institutions to sponsor a minimum number of sports for women.

At the 1984, NCAA Convention, the NCAA membership took another major step to ensure equality of athletics opportunity for women. Currently, to qualify for membership in Division I of the NCAA, institutions must offer at least eight varsity intercollegiate sports involving all-male teams or mixed teams of males and females. NCAA legislative adopted this year requires such institutions affiliating their women's programs with the NCAA to sponsor a minimum of six varsity intercollegiate sports involving all-female teams as of September 1, 1986; seven such teams as of September 1, 1987, and eight as of September 1, 1988.

Similarly, under current NCAA rules, to qualify for membership in Division II, institutions must offer at least six varsity intercollegiate sports for all-male or mixed teams. Under new legislation adopted this year, Division II institutions affiliating their women's programs with the NCAA must sponsor a minimum of five varsity intercollegiate sports involving all-female teams as of September 1, 1987, and six as of September 1, 1988. The NCAA believes that these new sports sponsorship requirements are considerably more demanding than the comparable requirements of Title IX, and they will make an important contribution to the continued development of increased athletics opportunities for women.

COMMENTS ON H.R. 5490

As stated above, the NCAA is committed to providing equality of athletics opportunity to male and female student-athletes and will remain so committed without regard to the action taken by Congress on H.R. 5490. Within that context, we express the following views with respect to the proposed bill.

As originally enacted, Title IX applied only to specific programs and activities receiving Federal financial assistance. The rationale for a statute so structured was that the Federal government should not finance programs or activities in which discrimination exists.

H.R. 5490 would amend Title IX to broaden its coverage from the particular program or activity receiving Federal financial assistance to an entire entity and related subunit's receiving, directly or indirectly, any such aid, without regard to the nature or extent of the assistance or its proximity to or remoteness from the primary program or activity to be regulated or investigated.

A serious question should be raised as to whether it is reasonable to maintain the premise that receipt of Federal aid provides a basis for jurisdiction when, under the terms of the proposed bill, jurisdiction would arise regardless of how limited, indirect or remote from the program or activity being subjected to Federal control such receipt of Federal aid may be.

First, we believe that the potential implications of Grove City for college athletics are not as far-reaching as some seem to think they are. The award of financial aid to students—including students-athletes—remains subject to Title IX if any Federal funds are involved in the institution's scholarship or grant-in-aid program. Further, various forms of Federal assistance (for example, work-study aid to students employed in athletics programs, assistance in financing the construction of facilities, and grants to other parts of the intercollegiate sports program) may provide the necessary basis for Title IX jurisdiction over the intercollegiate athletics programs of many (or most) institutions. Moreover, in addition to Title IX, the equal protection clause of the Fourteenth Amendment, and many existing constitutional and statutory provisions require equality of treatment without regard to sex. Finally, we believe that the higher education community has made a good faith commitment to provide equality of athletics opportunity regardless of the prcise limits of Federal Title IX jurisdiction.

Second, the legislation—as we understand it—would bring under the Federal rule-making and enforcement authority not only separate departments, but even separate campuses and institutions that neither receive Federal aid nor receive significant support from Federal assistance extended to other campuses and institutions. The bill provides, we believe, that if one BEOG-aided nursing student attends Kansas State University, Manhattan, Kansas, the K-State crew—a club sport not related to the varsity athletics program—would be under Title IX, the Big Eight Conference, Kansas City, Missouri, of which Kansas State is a member, would be under Federal inspection and enforcement, and a business extension course, if conducted by Kansas State University at Colby, Kansas, would be under Federal authority.

It is this type of pervasive protraction of Federal rule-making authority, paper work, investigation and enforcement that has led to many citizens' desire for decontrol, not more control. Illogical extension of Federal policy, we believe, weakens respect for that policy.

Third, this type of contemplated expansion of Federal controls will bring added demands for inspection and enforcement—much of it directed at essentially inconsequential matters—thus weakening, in our view, the primary enforcement of vital aspects of civil rights. We all should keep our eyes on the fundamental objective—equal opportunity in the principal activities of our society for women as well as men. We believe that intercollegiate athletics and the NCAA, in one limited arena, have been in the forefront of our society in achieving that objective.

Thank you for the opportunity to express these views.

PREPARED STATEMENT OF HARRY S. JONAS, M.D., DEAN, UNIVERSITY OF MISSOURI-KANSAS CITY SCHOOL OF MEDICINE

Congressman Coleman, Members of the Forum: President James Olson sends his regrets that he is unable to be here today to represent the University of Missouri and to testify before this forum concerning H.R. 5490.

Although my comments will be concentrated on the subject of women in professional education, I will also attempt to reflect President Olson's views in general on this subject as well as that of the University of Missouri system.

As Dean of the University of Missouri-Kansas City School of Medicine, it is a privilege today to testify before this congressional forum in regard to the increasing role of women in professional eduction, where some dramatic changes have taken place since 1972. I would like to discuss these changes and how they may relate to the proposed legislation in H.R. 5490 and similar legislation in the Senate.

This period of time roughly coincides with the enactment of the Education Amendments of 1972, and the establishment in 1971 of the University of Missouri-Kansas City School of Medicine, and its 6-Year, combined MD-Baccalaureate Degree Program. It is important to note here that the UMKC School of Medicine is a community-based educational institution that calls for early admission of the best and brightest graduating students from Missouri high schools directly into the Medical School's academic program. This early admission eliminates the need for the traditional "second hurdle" to get into medical school and the unnecessary competitive stress forced on students who must compete for positions in the formal professional schools upon completion of their undergraduate degree. In the past several years, Harvard University, Case Western University, Washington University in St. Louis, and other major institutions have instituted similar early admission programs to capture students with the greatest potential for achievement in medical education.

In 1971, the UMKC concept of Medical Education was a uniquely different model than the more traditional programs at other medical schools in the United States. The Board of Curators of the University of Missouri believed that the UMKC model could serve as a laboratory for medical education to determine whether such an alternative approach could enhance the retention of graduates in the state, provide the necessary medical manpower in the primary care fields, and lessen the pace toward super-specialization. Moreover, the Curators believed that an educational system with two different approaches such as we have in Kansas City and Columbia would be of value to the State of Missouri and to the nation as well.

Today, some sixteen years after the Curator's approval. Missouri's experiment has produced dramatic results. The UMKC School of Medicine has proved to be cost-effective, educationally sound, and a recognized pioneer, leader, and a force for change in medical education. It is in the forefront of the nations medical schools and colleges committed to innovation in the medical curriculum.

The school has undertaken significant studies of its applicants, its students, and its graduates that continue today. This data, along with comparable national data, reflect the increasing numbers of females matriculating not only at UMKC, but in all medical schools during this period.

Using the base year, 1972-73, the year of enactment of Title IX, 5,480 women, or 15.2%, applied for entrance to medical schools in the United States. At UMKC, 27% of the applicants were female. Those percentages in 1982-83 were 32.7% nationally, more than double the 1972-73 national figure, and 46% at UMKC, more than 3 times the national average in 1972-73.

In 1972-73, the percentage of women in entering classes of all medical schools in the nations was 16.9%: 28% at UMKC. In 1983-83, women in entering classes nationally exceeded 29%, while UMKC accepted 46%, almost 3 times the national percentage in 1972-73.

In 1972-73, the percentage of female graduates in all U.S. medical schools was 8.9% (924 female M.D.'s) compared with 26.7% in 1982-83 (4,193 female M.D.'s), four and one half times more female graduates 10 years after Title IX. At UMKC the percentage of graduates in 1972-73 was of course 0, but in 1982-83, 34 of the 78 UMKC graduates were women, or 43.5%, almost five times the national figure 10 years earlier.

It is apparent from these statistics that significantly increasingly numbers of women are applying for, being accepted by, and graduating from U.S. medical schools. In 1982-83, more than 46% of the women who applied to U.S. medical schools were admitting.

The number and percentage of women in academic faculty positions at U.S. medical schools, while still relatively low, is increasing as more and more women enter the academic medical field. At UMKC, two of our six medical school assistant and associate deans are women. Although no U.S. medical school presently has a female dean, and the American Medical Association has not yet named a female president, it is interesting to note here that the American College of Obstetricians and Gynecologists—a specialty historically the province of male physicians—just last week installed Dr. Luella Klein of Atlanta, Georgia, President for 1984-85. Dr. Klein has become the first woman president in the organization's history, a national medical group representing nearly 24,000 obstetricians and gynecologists. It is additionally interesting to note that Dr. Klein will appear on television tomorrow morning on the CBS Morning News, to discuss her new role in organized medicine.

We are proud of our medical record in providing significant opportunities for women to enter medical education. Reflecting on national trends in education, it is interesting to note that the year of establishment of our school—1971—coincided with the enactment of Title IX as well as significant societal trends toward assuring women's rights.

Historically such societal factors have been modified significantly as a result of legislative initiatives taken by the Government of the United States. In the meantime, however, educational institutions such as the University of Missouri remain totally committed in this effort as well.

Regardless of the outcome of either the Grove City decision or the legislation now being considered, the University of Missouri intends to press forward in this commitment for equal opportunity for minorities and women in all of the University's programs.

Thank you for your attention.

PREPARED STATEMENT ON BEHALF OF AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES

On behalf of 360 colleges and universities enrolling over 2.5 million students, the American Association of State Colleges and Universities would like to share its views in support of H.R. 5490, the Civil Rights Act of 1984.

In February of this year, the Supreme Court decided in the case of *Grove City College* vs. *Bell* that an institution must comply with Title IX only in a specific "program or activity" that receives federal funds. Under this ruling, despite the receipt of federal funds, the rest of the institution is free to discriminate on the basis of sex without violating Title IX. We believe this decision must be corrected promptly through legislation, and we believe H.R. 5490 is a suitable remedy.

The Grove City decision has implications far beyond the scope of Title IX since Title IX's anti-sex discrimination language was modeled after the landmark Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin. In addition, two other statutes are affected by the Grove City decision—Section 504 of the 1973 Rehabilitation Act, which prohibits discrimination on the basis of handicap, and the 1975 Age Discrimination Act, which bars discrimination on the basis of age. All of these civil rights statutes bar some form of discrimination in entities that receive federal funds. Their effectiveness has been seriously jeopardized by the Court's decision because for the first time the scope of these statutes has been limited to programs receiving federal funds within institutions and not the entire institution.

Prior to the Grove City decision, every administration charged with enforcing the anti-discrimination statutes—Republican and Democratic alike—interpreted coverage in the same broad manner. Investigation throughout an institution was permitted as long as any "program or activity" within it received federal funds. Investigation and enforcement was not limited to a specific portion or program of an institution. Additionally, in the twenty years since the passage of the first civil rights law, Congress has taken no action to indicate it disagreed with this interpretation. For example, there have been several attempts to amend Title IX in Congress. These proposals have attempted to limit Title IX coverage in athletics, physical education, and choirs, thereby reducing the scope and coverage of the statute. But Congress has never acceded to these proposals. In fact, as recently as last November, the House overwhelmingly reaffirmed its support for a comprehensive interpretation of Title IX.

Mr. Chairman, some of my colleagues in the education community consider this legislation as far reaching and breaking new ground. AASCU does not. H.R. 5490 simply restores for these four statutes the broad scope and coverage intended by Congress and consistently interpreted by the Executive Branch since 1964. AASCU institutions have followed this broad coverage since these statutes were implemented. We are better institutions because of it and H.R. 5490 will help us continue in this direction.

Precisely because of the broad coverage and interpretation of these four civil rights statutes, tremendous strides in access and opportunity have been taken in higher education. For example:

Between 1970 and 1979, Black enrollment in postsecondary institutions increased 92 percent;

Since 1970, Hispanic enrollment has doubled;

Since 1970, enrollment of women has increased by 66 percent.

Since enactment of Title IX in 1972, not one college or university has lost federal funding due to failure to comply with Title IX. Yet due to voluntary compliance of educational institutions, greater numbers of women have been able to take advantage of educational opportunities. For example:

Since 1972, the number of Ph.Ds earned by women has risen from 16 percent to 31 percent;

Participation of women and girls in intercollegiate sports has grown 100 percent since 1972. In 1982, about 30 percent of all intercollegiate athletes were women;

In 1972, college women received less than one percent of the athletic scholarship funds; by 1980, they received 21 percent.

Some of my colleagues have been concerned about past enforcement procedures and future policies that would be implemented if H.R. 5490 were passed. We agree that enforcement procedures are critical and those in H.R. 5490 should not cause problems for higher education institutions. Our only concern is that the Department of Education's Office of Civil Rights be considerate of the particular needs of higher education institutions when enforcing these laws. Such sensitivity requires understanding of the special nature of higher education and we offer our assistance to the Department of Education to develop and provide any guidelines that the OCR staff deems necessary.

Finally, Mr. Chairman, with respect to the use of fund termination as a remedy, only financial assistance found to be supporting the discrimination may be terminated. The bill retains the requirement that a nexus be established between the discrimination found and any federal funding that is to be terminated or suspended by the administrative agency enforcing the law.

Eliminating discrimination on the basis of race, color, national origin, sex, handicap, or age is a national goal and cannot be accomplished by allowing pockets of prejudice to exist. Any institution that receives public funds—either in the form of direct institutional aid or student aid—should lead the way in setting the highest standards for equality. The Grove City decision weakens these standards and for that reason it should be overturned by Congress. AASCU stands ready to assist you to that end.

Thank you.

CIVIL RIGHTS ACT OF 1984

MONDAY, MAY 21, 1984

HOUSE OF REPRESENTATIVES,
COMMITTEE ON EDUCATION AND LABOR, AND
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
Washington, DC.

The joint committees met, pursuant to call, at 9:26 a.m., in room 2141, Rayburn House Office Building, Hon. Don Edwards (chairman of the Subcommittee on Civil and Constitutional Rights) presiding.

Members present: Representatives Erlenborn, Petri, Bartlett, and McCain, Committee on Education and Labor; Representative Edwards, Subcommittee on Civil and Constitutional Rights.

Staff present: Rose M. DiNapoli, minority legislative associate, Education and Labor; Laurie A. Westley, assistant counsel, Education and Labor; Ivy L. Davis, assistant counsel; Philip Kiko, associate counsel, Judiciary Committee; Electra C. Beahler, minority counsel for education, Education and Labor.

Mr. EDWARDS. The hearing will come to order.

Today we are going to continue the joint hearings by the Committee on Education and Labor, and the House Judiciary Subcommittee on Civil and Constitutional Rights of H.R. 5490, which is entitled the Civil Rights Act of 1984.

The purpose of this bill is to restore the enforcement practices which began 20 years ago with the enactment of title VI and its progeny which prohibits discrimination in programs receiving Federal funds.

Before we introduce the witnesses, we welcome the gentleman from Arizona from the Education and Labor Committee, Mr. McCain.

Mr. MCCAIN. Thank you, Mr. Chairman.

Mr. EDWARDS. Now, this morning we are going to have two panels and the first panel—my goodness, it is a very distinguished group—and they represent national organizations whose constituencies are protected by these antidiscrimination provisions.

I think I will introduce all of the first panel, and then go from there asking them to testify.

Mr. Benjamin Hooks is the executive director of the National Association for Advancement of Colored People; Judy Goldsmith is the president of the National Organization for Women in Washington, DC, and nationwide; John Kemp is director of human resources, National Easter Seal Society from Chicago; Arthur Flemming, a good friend of the committee for many, many years, is chairman of the Citizens Commission on Civil Rights; and of course Mary Futrell, is the president of the National Education Association.

I believe on the list here Mr. Hooks, you are first.

Incidentally, without objection, everybody can proceed as they like but we will without objection make all of the statements a part of the record.

STATEMENT OF BENJAMIN HOOKS, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. HOOKS. Thank you, Mr. Chairman, and members of the committee of this joint hearing. I am Benjamin L. Hooks, executive director for the Advancement of Colored People.

With me today is Mrs. Althea Simmons, director of the Washington Bureau of the NAACP. We are an organization which this year celebrates its 75th anniversary, a national organization with over 1,800 branches, youth and college divisions who support H.R. 5490. Mr. Chairman, our membership is about 412,000.

Mr. Chairman, I am also the chairperson for the leadership conference on civil rights comprising over 160 national organizations for whom Mr. Joseph Rauh has testified before you, May 16, 1984, stating, the groups, in unison, support H.R. 5490. The NAACP commends Congress for its swift attention to the need for this legislation to reassert the policies and laws of this land that Government will not sponsor inequality.

The Civil Rights Act of 1964 was passed almost a century later to fully implement the 14th amendment to the Constitution. The clearly stated purpose of the legislation was "to secure to all Americans the equal protection of the law of the United States and of the several States."

Mr. Chairman, the Civil Rights Act of 1964 merely restates and codifies the law and commitment of our Nation, once again, to its ideals of freedom, equality, justice and opportunity.

Title VI, the benchmark legislation prohibiting the use of Federal assistance for the purpose of unlawful discrimination, was passed in recognition that 76 years after the ratification of the 14th amendment documentation proved that citizens were still denied their equal benefits from the use of federally assisted projects on the basis of race, color or national origin in the areas of health, in the area of agriculture, in the area of research, by racially segregated facilities, staffing, in job training programs. Billions of dollars of Federal money was supporting unlawful discrimination.

The times were turbulent: Three students were murdered in Mississippi, there were church bombings, riots were from New York to California, those killed were seeking equal access to lunchcounters, schools or the voting booth.

As stated in *Young* v. *Pierce,* "the specific goal of title VI is to eliminate racial discrimination from the social fabric of the nation."

The rights of others, although not yet articulated as of constitutional dimension as are by statute and regulations modeled after the Civil Rights Act of 1964. The impact of an attack on one is an attack on all. So it is appropriate that the legislation before you address title VI, title IX of the Education Amendments of 1972, which prohibit gender-based discrimination, section 504 of the Rehabilitation Act of 1973 proscribing discrimination toward the handicapped and the Age Discrimination Act of 1975, because although the *Grove City College* decision addressed the scope of title IX, gender-based discrimination, the reasoning used to narrow the meaning of title IX can all too easily be attempted as regards title VI.

It is axiomatic that those who would circumscribe the rights of others do not discriminate in their hatred and inequality.

In the 20 years since the passage of the Civil Rights Act of 1964, many attempts, unsuccessful attempts, have been made to narrow its scope and meaning. For 20 years through Republican and Democratic administrations, title VI has been interpreted, and the interpretation upheld by court decisions, as being broad in its coverage and narrow in its sanction of fund termination.

The legislative history is replete with the doctrine that "the breadth of the principle of non-federally funded discrimination is wide." Conversely, the sanction of fund termination was considered to be pinpointed to the Federal money which, directly or indirectly, supports discrimination. In other words, a condition of the grant of Federal assistance whether money, real estate or services, is that one must comply with the principle of equality or risk losing national support.

The principles of civil rights are today under siege. It is unconscionable that 119 years after the abolition of slavery we must restate and reaffirm our commitment to equality. "The cost of freedom is still vigilence."

In 1965 as today the NAACP stands firms in our support for the restatement of the law of our land: Our taxpayers' money will not pay for unlawful discrimination.

Again, we commend you for your swift and needed response to today's challenge.

Mr. EDWARDS. Thank you very much, Mr. Hooks.

Our next witness will be Ms. Judy Goldsmith, president of the National Organization for Women.

STATEMENT OF JUDY GOLDSMITH, NATIONAL ORGANIZATION FOR WOMEN

Ms. GOLDSMITH. Thank you very much, Mr. Chairman, for the opportunity to testify this morning.

I am Judy Goldsmith, president of the National Organization for Women, the Nation's oldest and largest feminine organization with a quarter million members.

I am here today to testify in support of the Civil Rights Act of 1984. This legislation is an urgently needed response to the devastating recent Supreme Court decision in *Grove City College* v. *Bell*. The Court struck a severe blow to women's rights in education when it mandated a narrow interpretation of title IX of the education amendments of 1974.

Title IX prohibited sex discrimination in all federally-assisted educational institutions until the Supreme Court ruled in February that a college receiving Federal funds only for student financial assistance is required to comply with title IX only in its student aid program. That ruling allows other parts of the institutions to discriminate freely on the basis of sex without violating title IX. As a result of the *Grove City* decision, and in the absence of an equal rights amendment, there is not now any Federal law that comprehensively prohibits sex discrimination in education.

Title IX was based on title VI of the Civil Rights Act of 1964, as were the Age Discrimination Act of 1975 and section 504 of the Rehabilitation Act of 1973. The pertinent sections of all four of these statutes contain the phrase "program or activity" which was central to the Supreme Court's narrow interpretation in *Grove City.* Thus, all protections afforded under these statutes are jeopardized by the *Grove City* ruling.

The effects of the decision are already being felt. Shortly after the Court handed down its decision, the U.S. Department of Education dropped plans to file a complaint against the University of Maryland for failing to provide adequate athletic opportunities for its women students.

Another complaint was filed in 1976 with the Department of Education's Office for Civil Rights, charging Mississippi College, a Federal grant recipient, with discrimination against women and blacks in employment opportunities and benefits, and in the treatment of students. The complainant received a letter from OCR in March of this year saying that OCR no longer had jurisdiction to pursue the case in light of the *Grove City* ruling.

Although the proposed legislation reaffirms congressional intent for a broader interpretation of all four of these statutes, I will limit my testimony to the beneficial effects of title IX on the effects of education rights for girls and women.

Clearly access to educational opportunity is crucial to advancement in a career and economic security.

The percentage of intercollegiate athletic budgets that goes to women has gone from 2 percent in 1972 to 16.4 percent in 1980. The number of high school girls playing sports has increased from 7 to 35 percent of all students since title IX was enacted. Development of sports skills at the junior high and high school levels is enabling more young women to compete for and pursue athletic scholarships.

Courses of nontraditional study which women had been barred or dissuaded from pursuing were sought out by women. Increasing numbers of women are now on a path that leads to careers once thought of exclusively as men's. The percentage of professional degrees conferred on women rose dramatically during the first decade of title IX. The percentage of law degrees earned by women increased from 6.9 to 32.4 percent; the percentage of medical degrees increased from 9 to 25 percent; and the percentage of Ph.D.'s increased from 17 to 31 percent.

Almost one-third of professional women in the United States work in education fields. Title IX is crucial to protecting their rights. It has been the impetus behind school systems upgrading salaries and benefits to ensure that men and women receive equal pay for teaching similar courses. Title IX has also been a force behind the increased number of female school administrators and principals, jobs once held almost exclusively by men.

The elimination of barriers that have held back half of our population in education has had a ripple effect. In the process of complying with title IX, schools at all levels have reviewed their practices and found ways to make improvements that are not even covered by title IX. More women and girls have been encouraged to—or not barred from—pursuing courses of training that are most appropriate for their talents and interests. The entrance of women into heretofore predominantly male fields is starting to narrow the wage gap. Title IX is a cornerstone of economic equality.

Yet despite the gains we have achieved under title IX, not enough has been done. Women college graduates still earn approximately the same as men with an eighth grade education. The annual income of white men is still the highest, with minority men a distant second, followed by white women and then minority women. In 1979, women comprised only 18 percent of the total number of students enrolled in technical vocational education programs. The ratio of boys to girls on the playing field is still 3 to 2 and girls often have inferior equipment and facilities.

The modest gains we have achieved are threatened by the action taken by the Supreme Court on February 28. Without an equal rights amendment or the protection that previously existed under title IX, we stand—girls and women stand to lose what we have achieved.

The Reagan administration has not yet made known its position on this proposed legislation. An administration spokesperson several weeks ago announced that the Reagan administration would not oppose the legislation, but hours later he retracted that statement.

President Reagan has said that he is for the "E" and the "R" but not the "A" and that he prefers a statute-by-statute revision of laws to eliminate sex discrimination. If this is, in fact, the case, it is peculiar that Reagan has not come out strongly in favor of the proposed legislation.

In considering the important legislation before you, I request that you keep in mind the statement of President John F. Kennedy when he proposed the civil rights legislation to Congress:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.

This principle is equally valid for race, sex, age, or handicap discrimination.

The National Organization for Women urges Congress to send a strong message that Federal subsidization of discrimination is not acceptable and will not be tolerated by acting quickly and favorably on the Civil Rights Act of 1984.

[Prepared statement of Judy Goldsmith follows:]

PREPARED STATEMENT OF JUDY GOLDSMITH, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN

Good morning. I am Judy Goldsmith, President of the National Organization for Women. NOW is the nation's oldest and largest feminist organization with 250,000 members.

I am here today to testify in support of the Civil Rights Act of 1984. This legislation is an urgently needed response to the devastating recent Supreme Court decision in *Grove City College* v. *Bell.* The Court struck a severe blow to women's rights in education when it mandated a narrow interpretation of Title IX of the Education Amendments of 1972. Title IX prohibited sex discrimination in all federally-assisted educational institutions until the Supreme Court ruled in February that a college receiving federal funds only for student financial assistance is required to comply with Title IX only in its student aid program. That ruling allows other parts of the institutions to discriminate freely on the basis of sex without violating Title IX. As a result of the *Grove City* decision, and in the absence of an Equal Rights Amendment, there is not now any federal law that comprehensively prohibits sex discrimination in education.

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Another complaint was filed in 1976 with the Department of Education's Office for Civil Rights, charging Mississippi College, a federal grant recipient, with discrimination against women and blacks in employment opportunities and benefits, and in the treatment of students. The complainant received a letter from OCR in March of this year saying that OCR no longer had jurisdiction to pursue the case in light of the *Grove City* ruling. Because data failed to establish that federal assistance was used to directly support the discriminatory actions alleged in the complaint, the *Grove City* decision allowed the OCR to consider the case beyond its purview.

Although the proposed legislation reaffirms Congressional intent for a broader interpretation of all four of these statutes, I will limit my testimony to the beneficial effects Title IX has had on women's education rights since its enactment in 1972.

Education has been the stepping stone to a better life and has been an integral part of the American dream. We all want our children to receive a good education in order to realize their potential. Clearly access to educational opportunity is crucial to advancement in a career and economic security.

However, the educational stepping stones have been slipperier for girls than for boys. As recently as ten years ago, many educational opportunities have been off-limits to women either directly, through policy, or through more subtle forms of discrimination. It was also not uncommon for women to be barred from the professional schools or vocational training programs that would help them advance in their chosen fields. This discrimination cheated many young women out of achieving their full potential and it cheated our country out of the talents and skills of half of our population.

Girls were encouraged to pursue courses of study that led to traditional "women's" jobs. Male students were steered into courses that would help them occupy predominantly male—and higher paying—occupations. Regardless of each boy's or girl's unique talents, gender classification was the overriding consideration in education, training and employment. This type of occupational segregation is the major reason for the "Wage gap" that exists today between men's and women's salaries. Fifty-one percent of all employed women work in 20 of the 427 Department of Labor job classifications. Eighty percent work in jobs that are predominantly female. Traditionally "women's" jobs pay less than those considered to be "men's" jobs, regardless of the skills or training required to perform them. A 1981 study by the National Research Council of the National Academy of Sciences shows that the more an occupation is dominated by women, the less it pays.

While Title IX has not solved the problem, it has certainly brought us closer to equal opportunity for girls and women in education. As an example, before Title IX, athletic programs for girls were nominal or severely limited. While physical fitness and the character-building advantages of team work were emphasized for boys, they were barely available to girls—though the same benefits are obviously desirable for both sexes. And athletic scholarships—once an avenue open exclusively to boys with athletic talents who wished to pursue an education but lacked sufficient funds—were opened to women in similar circumstances. Ten thousand young women are now attending college on athletic scholarships, including many who would not have the financial means to do so without such assistance. The number of women in college sports has increased by 250% during the last decade. The percentage of intercollegiate athletic budgets that goes to women has gone from 2% in 1972 to 16.4% in 1980. The number of high school girls playing sports has increased from 7% to 35% of all students since Title IX was enacted. Development of sports skills at the junior high and high school levels is enabling more young women to compete for and pursue athletic scholarships.

Courses of non-traditional study which women had been barred or dissuaded from pursuing were sought out by women. Increasing numbers of women are now on a path that leads to careers once thought of exclusively as men's. The percentage of professional degrees conferred on women rose dramatically during the first decade of Title IX. The percentage of law degrees earned by women increased from 6.9% to 32.4%; the percentage of medical degrees increased from 9% to 25%; and the percentage of PhD's increased from 17% to 32%.

Almost one-third of professional women in the United States work in education fields. Title IX is crucial to protecting their rights. It has been the impetus behind school systems upgrading salaries and benefits to ensure that men and women receive equal pay for teaching similar courses. Title IX has also been a force behind the increased number of female school administrators and principals, jobs once held almost exclusively by men.

The elimination of barriers that have held back half of our population in education has had a ripple effect. In the process of complying with Title IX, schools at all levels have reviewed their practices and found ways to make improvements that are not even covered by Title IX. More women and girls have been encouraged to—or not barred from—pursuing courses of training that are most appropriate for their talents and interests. The entrance of women into heretofore predominantly male fields is starting to narrow the wage gap. Title IX is a cornerstone of economic equality.

Women are not the only ones who benefit from economic equity. Economic gains made by women as a result of improved educational opportunities are shared with family and society as a whole. Women work outside the home in increasing numbers, usually out of economic necessity. In 1982, more than 9.4 million families—one out of six—were maintained solely by women. More than one-third of families are headed by women live in poverty. In order to eliminate the feminization of poverty, public education must adequately prepare women to face new career challenges and train them to fill the jobs that require a solid command of mathematics, science and computer language. It is heartening to see that a growing number of women are enrolling in these courses in order to secure careers in fields that show great promise for the decades ahead.

Despite the gains we have achieved under Title IX, not enough has been done. Women college graduates still earn approximately the same as men with an eighth grade education. The annual income of white men is still the highest, with minority men a distant second, followed by white women and then minority women. In 1979, women comprised only 18% of the total number of students enrolled in technical vocational education programs. In the academic year 1979–1980, women represented only one-tenth of engineering graduates. The ratio of boys to girls on the playing field is still three to two and girls often have inferior equipment and facilities. Women in higher education are most often Assistant Professors, and men are still in the higher ranks. The number of women faculty members has tripled in the last twenty years, but there are still far more tenured men than women.

The modest gains we have achieved are threatened by the action taken by the Supreme Court on February 28. Without an Equal Rights Amendment or the protection that previously existed under title IX, we stand to lose what we have achieved.

Further, Assistant Attorney General for Civil Rights William Bradford Reynolds has stated that, in his opinion, the Supreme Court ruling in *Grove City* may affect other anti-discrimination statutes.

The Reagan Administration has not yet made known its position on this proposed legislation. An Administration spokesperson several weeks ago announced that the Reagan Administration would not oppose the legislation, but hours later he retracted that statement.

President Reagan has said that he is for the "E" and the "R", but not the "A", and that he prefers a statute-by-statute revision of laws to eliminate sex discrimination. If this is, in fact, the case, it is peculiar that Reagan has not come out strongly in favor of the proposed legislation—legislation that makes clarifying changes in existing statutes to guarantee that they are consistent with the Congressional intent that motivated their enactment.

The legislation being discussed here today does not break any new ground in its prohibitions on discrimination. It is merely a reaffirmation of the principles of simple justice that all four statutes established and stood for until just a few short weeks ago. Title IX, Sec. 504, the Age Discrimination Act and Title VI of the Civil Rights Act all contained the letter and spirit of what is best about the law—simple justice. We cannot retain the broad spirit of these statutes without reestablishing the letter of the law.

In considering the important legislation before you, I request that you keep in mind the statement of President John F. Kennedy when he proposed the civil rights legislation to Congress: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination." This principle is equally valid for race, sex, age or handicap discrimination. The National Organization for Women urges Congress to send a strong message that federal subsidization of discrimination is not acceptable and will not be tolerated by acting quickly and favorably on the Civil Rights Act of 1984.

Thank you for the opportunity to appear today.

Mr. EDWARDS. Thank you very much, Ms. Goldsmith.

The next member of the panel to testify is Mr. John Kemp, who is director of human resources, National Easter Seal Society.

Mr. Kemp.

STATEMENT OF JOHN KEMP, DIRECTOR, HUMAN RESOURCES, NATIONAL EASTER SEAL SOCIETY

Mr. KEMP. Thank you very much.

My name is John Kemp. I am director of human resources for the National Easter Seal Society. I am honored to appear before you today as a representative of the National Easter Seal Society.

With me is Joel Roemer, director of our office of congressional affairs. Our organization strongly supports H.R. 5490, which clarifies antidiscrimination protection under section 504 of the Rehabilitation Act and the other civil rights statutes.

Last year we served 900,000 people, and we have 500,000 interested and caring persons serving those persons. As background, in 1960 I was the National Easter Seal poster child living in Bismark, ND. Two years later my father turned down a promotion to move to Washington, DC, because he could find no public school system in this metropolitan area which would accept me because of my disability.

I am a disabled person who has possibly been perceived as having made it. Thanks to my dad I have attended Georgetown University and Washburn University School of Law, Topeka, KS, and presently work for Easter Seals.

Since 1977, the first year in which the Federal Government promulgated regulations implementing section 504 of the 1973 Rehabilitation Act, I have worked as a management consultant on section 504 implementation issues and as a Federal contractor and subcontractor to provide training and technical assistance to Federal financial recipients.

From my direct experience with section 504, I can say without equivocation that when recipients are given appropriate technical assistance, they will make their programs and services accessible to disabled persons.

From an employment practices perspective, employer-recipients can readily appreciate the value of making reasonable accommodations to disabled persons' limitations because it is sound human resources management to do so. Employers are quick to maximize skills, provide training, and improve working conditions for all employees because it enhances improved productivity.

Employers make reasonable accommodations and, in doing so, remove artificial, environmental barriers to safe, productive work for disabled persons. Through job modifications, adaptive equipment, and disability awareness training, discriminatory behavior in the workplace is eliminated.

During consultations with the National Governors' Association, the U.S. Conference of Mayors, and the Tennessee Hospital Association, I worked closely with their members on section 504 implementation strategies. Although some members did not readily and fully appreciate the rationale for compliance with these civil rights laws and regulations for disabled persons, they were willing to consider and implement various cost-effective alternatives to program access problems.

The key is alternatives—all of which promoted the integration of disabled persons.

Our consulting work was with several large retailers and was not prompted by a complaint or enforcement matter. Safeway Foods asked us to explore accessibility considerations to accommodate mobility impaired consumers and customers and the same for the Kansas City based Hallmark Cards. Their concern was economic-based accessibility, not compliance and enforcement.

Easter Seals has worked to eliminate discrimination not only by recipients of Federal financial assistance but by all institutions in our society. Through our network of 250 Easter Seal affiliates, we served over 881,000 persons last year. We provided medical, vocational, and social services to individuals with disabilities and their families as well as health screening and public eduation for the nondisabled.

From our direct experience with disabled people, we know the frustrations of those who are unable to participate fully in daily life activities that many of us take for granted. As a society, we have made great strides in removing physical and attitudinal barriers to equal opportunity for people with disabilities.

However, we haven't gone far enough. The legislation which you are considering today will eliminate one major obstacle to our goal of equal opportunity.

All too often, the physical appearance—we have been, despite skills acquired through training, unable to obtain meaningful employment for which we are qualified or to move freely throughout their communities.

Easter Seals is deeply concerned with the quality of life of disabled persons it serves long after they have completed their involvement with us.

I would urge the distinguished members of this panel to expeditiously consider and pass H.R. 5490. If Congress fails to pass this legislation, there will be serious ramifications for the millions of disabled people in this country. Without the full protection of section 504, the gains that America's disabled persons have made in recent years will be substantially eroded.

Section 504 is looked to by the handicapped as the hallmark of this Nation's commitment to the handicapped. Congress extended a promise of nondiscrimination, as yet unfulfilled. However, in the 10 short years since section 504 has been in effect, it has opened doors which the *Grove City* decision threatens to close once more.

The benefits of nondiscrimination are realized not only by disabled citizens, but the society as a whole. Equal opportunity is not only a moral and legal imperative but it is a good investment in the future.

The National Easter Seal Society and other organizations representing people with disabilities which will be appearing before this panel have unequivocal commitment to fulfilling the dream originally envisioned by enactment of section 504.

The *Grove City* decision poses an immediate threat to the realization of a fuller life by millions of disabled people. Undue hesitation on the part of Congress in enacting H.R. 5490 will send a signal to employers, educational and health care institutions, transportation agencies and other institutions that the Nation's leadership is retreating from the goal of equality of opportunity for all Americans.

As in the past, people with disabilities are looking to Congress for leadership on the issue of fairness and equal opportunity. We trust that this leadership will be forthcoming so that disabled people of this country will be able to participate in our society to the fullest extent possible.

Thank you.

Mr. **Edwards**. Thank you very much, Mr. Kemp.

[Prepared statement of John Kemp follows:]

PREPARED STATEMENT OF JOHN KEMP, DIRECTOR OF HUMAN RESOURCES, NATIONAL EASTER SEAL SOCIETY

My name is John Kemp. I am Director of Human Resources for the National Easter Seal Society. I am honored to appear before you today as a representative of the National Easter Seal Society. Our organization strongly supports H.R. 5490, which clarifies anti-discrimination protection under Section 504 of the Rehabiliation Act and the other civil rights statutes. It would make it clear that recipients of federal assistance are required to make all of their programs and employment opportunities accessible and available to persons with disabilities.

Since 1977, the first year in which the federal government promulgated regulations implementing Section 504 of the 1973 Rehabilitation Act, I have worked as a management consultant on Section 504 implementation issues, as a federal contractor and subcontractor to provide training and technical assistance to federal financial recipients, and currently as Director of Human Resources for the National Easter Seal Society. From my direct experience with Section 504, I can say without equivocation that, when recipients are given appropriate technical assistance, they will make their programs and services accessible to disabled persons.

From an employment practices perspective, employer-recipients can readily appreciate the value of making reasonable accommodations to disabled persons' limitations because it is sound human resources management to do so. Employers are quick to maximize skills, provide training, and improve working conditions of all employees because it enhances improved productivity. Employers make reasonable accomodations and, in doing so remove artificial, environmental barriers to safe, productive work for disabled persons. Through job modifications, adaptive equipment and disability awareness training, discriminatory behavior in the workplace is eliminated.

During consultations with the National Governors' Association, the U.S. Conference of Mayors and the Tennessee Hospital Association, I worked closely with their members on Section 504 implementation strategies. Although some members did not readily and fully appreciate the rationale for compliance with civil rights laws and regulations for disabled persons, they were willing to consider and implement various cost-effective alternatives to program access problems. The key is "alternatives"—all of which promoted the integration of disabled persons

Easter Seals has worked to eliminate discrimination not only by recipients of federal financial assistance, but by all institutions in our society. Through our network of 250 Easter Seal affiliates, we served over 881,000 persons last year. We provide medical, vocational and social services to individuals with disabilities and their families as well as health screening and public education for the nondisabled. From our direct experience with disabled people, we know the frustrations of those who are unable to participate fully in daily life activities that many of us take for granted. As a society, we have made great strides in removing physical and attitudinal barriers to equal opportunity for people with disabilities. However, we haven't gone far enough. The legislation which you are considering today will eliminate one major obstacle to our goal of equal opportunity.

I would urge the distinguished members of this panel to expeditiously consider and pass H.R. 5490. If Congress fails to pass this legislation, there will be serious ramifications for the millions of disabled people in this country. Without the full protection of Section 504, the gains that America's disabled population have made in recent years will be substantially eroded.

Although the *Grove City* v. *Bell* decision dealt specifically with Title IX, it is apparent that the Court's holding applies to all of the anti-discrimination statutes including Section 504 of the Rehabilitation Act. Since its enactment in 1973, Section 504 has facilitated the integration of disabled persons into all aspects of American life.

Section 504 states: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

By enacting this provision, Congress recognized that, while there are substantial differences in the nature of various disabilities, people with disabilities as a group face discrimination in many aspects of life, including employment, education, housing and transportation, to name just a few. Looking at the legislative history of Section 504, it is clear that the Congress intended that this statute would put an end to discriminatory practices and policies which prevent equal opportunity and full participation by disabled citizens.

Section 504 was the first major federal law specifically protecting the civil rights of persons with disabilities. The history of this provision demonstrates Congress's intent to prevent discrimination in all programs and activities operated by recipients of federal assistance. This is clearly the interpretation which was made by the Department of Health, Education and Welfare when it issued its 504 implementing regulations on May 4, 1977, and the coordination guidelines on January 13, 1978. The underlying premise of the regulations is that all recipients of federal financial assistance from any source must assure non-discrimination, access and equal opportunity in all of their programs, activities and operations.

Section 504, more than any other piece of legislation, is looked to by disabled Americans as the hallmark of this nation's commitment to integration and equal opportunity. Congress extended a promise of non-discrimination, as yet unfulfilled. However, in the ten short years since its enactment, Section 504 has opened doors which the *Grove City* decision threatens to close once more. The benefits of non-discrimination are realized not only by disabled citizens, the direct beneficiaries of Section 504, but by the society as a whole. Equal opportunity is not only a moral and legal imperative, it is a good investment in the future.

A strong national policy of anti-discrimination is necessary to open employment opportunities to disabled Americans. Disabled people face staggering unemployment rates. Unemployment has currently been estimated to be between 50 and 75 percent by the President's Committee on Employment of the Handicapped. Furthermore, studies indicate that only in a tiny percentage of cases is inability to perform a regular, full-time job the reason a disabled person is not employed. A comparison between the studies on employer's attitudes and the studies on the actual performance of disabled workers demonstrates a large discrepancy between the perceived incapacity and the actual incapacity of disabled applicants and workers. Disabled people face discrimination in employment in a variety of ways. Many disabled people are excluded from the onset by medical requirements which screen out all people with specific disabilities or by inflated physical or other job requirements which bear no relationship to the successful performance of the job. Disabled people who are not completely excluded at the onset are often channeled into disability-stereotyped dead-ended jobs or denied promotional opportunities. These discriminatory policies affect all disabled people, whether their disabilities are severe, moderate or perceived.

The cost of employment discrimination is tremendous to disabled individuals and to society at large. In a major study commissioned by the Office of Civil Rights, HEW, it was estimated that eliminating discrimination against handicapped people in HEW-funded grant programs would yield $1 billion annually in increased employment and earnings for disabled people. In addition to increasing the gross national product, it has been estimated that such an earnings increase by handicapped workers would result in some $58 million in additional tax revenues to federal, state and local governments.

Similarly, studies indicate that equal educational opportunities yield substantial economic benefits by reducing the need for institutionalization, increasing future earnings, and decreasing the need for public assistance. For example, in 1976, HEW estimated that expansion of special education services pursuant to the requirements of Section 504 of the Rehabilitation Act would result in an annual increase of $1.5 billion in adulthood earnings of the additional handicapped children served.

The National Easter Seal Society and other organizations representing people with disabilities which will be appearing before this panel, have an unequivocal commitment to fulfilling the dream originally envisioned by the enactment of Section 504. The *Grove City* decision poses an immediate threat to the realization of a fuller life by millions of disabled people. Undue hestation on the part of Congress in enacting H.R. 5490 will send a signal to employers, educational and health institutions, transportation agencies and other institutions that the nation's leadership is retreating from the goal of equality of opportunity for all Americans.

As in the past, people with disabilities are looking to Congress for leadership on the issue of fairness and equal opportunity. We trust that this leadership will be forthcoming so that more of the disabled population of this country will be able to participate in our society to the fullest extent possible.

Mr. EDWARDS. The next member of the panel to testify is Mr. Arthur Flemming, longtime Chairman of the U.S. Commission on Civil Rights and who did such a magnificent job and is now chairman of the Citizens Commission on Civil Rights.

Mr. Flemming.

STATEMENT OF ARTHUR FLEMMING, CHAIRMAN, CITIZENS COMMISSION ON CIVIL RIGHTS

Mr. FLEMMING. Mr. Chairman, thank you very much.

As you have indicated, I do appear as chairman of the Citizens Commission on Civil Rights. I also represent the National Council on Aging and as a result of my experiences as U.S. Commissioner on Aging, I know that the views of the National Council on Aging reflect the views of the other major organizations in the field of aging.

I certainly appreciate the opportunity to appear before the Committees on the Judiciary and Education and Labor in order to present my views on H.R. 5490, the Civil Rights Act of 1984.

It is my understanding that this legislation is intended to restore four major civil rights statutes—title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the 1973 Rehabilitation Act, as amended in 1978, and the Age Discrimination Act of 1975—to the broad scope of coverage that was originally intended by Congress and that characterized their administration prior to this Supreme Court decision in *Grove City College* v. *Bell.*

I support without reservation the enactment of this legislation.

As we observe the 30th anniversary of *Brown* v. *Board of Education,* we know that there are many of our citizens who question the Federal Government's continuing commitment to the attainment of the objectives embodied in that landmark decision.

Until the decision of the Supreme Court in the *Grove City College* case, it was assumed that if educational institutions received financial assistance for any of its programs the entire institution would be subject to the provision of title IX.

However, as a result of the Supreme Court decision, it is now assumed that if an educational institution receives Federal financial assistance for just one program, it can ignore title IX for all of its other programs. It is also assumed that this same line of reasoning would be used in determining the jurisdiction of the Federal Government under title VI of the Civil Rights Act of 1964, section 504 of the 1973 Rehabilitation Act, as amended in 1978, and the Age Discrimination Act of 1975.

If the Congress of the United States permits the enforcement of these laws to be based on such an assumption the citizens of our Nation will be convinced that the Federal Government has decided to walk away from the constitutional obligations defined in *Brown v. Board of Education* and subsequent opinions.

In my judgment, the record of the executive branch in implementing civil rights laws in the area of the delivery of services has been on balance a poor one. If the Congress fails to respond to the *Grove City* decision, it is clear that the Nation will take a long backward step in this area. This cannot and should not be permitted to happen.

Title IX has been the catalyst for gains in achieving equal opportunities for women students and employees in schools and colleges across the Nation. What has happened, however, simply constitutes a fair start. A great deal more remains to be done.

If Congress does not respond to the *Grove City* decision, we know that one institution after another will decide that it is no longer necessary to adjust their programs and administrative practices in order to meet the objectives of title IX.

Prior to the inclusion of title VI in the Civil Rights Act of 1964, racial discrimination in programs designed to provide health, welfare, and educational services to our people was rampant. Title VI prohibited such practices. Some of them have come to a halt as a result of the implementation of title VI. Many of these practices still continue.

If the *Grove City* decision continues to be the law of the land, we could very easily find ourselves reverting to the type of institutional discrimination that confronted us prior to 1964.

How can we justify a policy that would say to institutions involved in federally supported service programs in these areas, "all you need to do is avoid discrimination in the areas where you receive Federal funds; you are free to practice discrimination at will in all other areas of your institution." We would not only be tolerating, we would be putting an official stamp of approval on discriminatory practices by institutions that are helping the Federal Government to discharge its responsibilities to its citizens.

We know that it has been necessary to combat institutional discrimination in institution after institution in connection with the implementation of section 504 of the 1973 Rehabilitation Act, as amended in 1978. This act has been and continues to be a challenge to the status quo.

All kinds of reasons have been advanced by institutions for not complying with the provisions of the act. The Congress would certainly be replacing hope with despair in the lives of the handicapped if it permitted the *Grove City* decision to be applied to the enforcement of this very important piece of legislation.

In 1978, as a result of a directive from the Congress, the U.S. Commission of Civil Rights, which I was then serving as chairman, conducted field studies and held public hearings to determine the extent to which ageism existed in the administration of programs financed by Federal funds.

As a result of these studies and hearings, we concluded that discrimination on the basis of age was widespread and that these discriminatory practices were having an adverse impact on the lives of older persons.

For example, in the field of mental health, we found that in community mental health clinics on an average only 4 or 5 percent of the total number of persons being served were over 65.

The executive branch has made very little progress in implementing the Age Discrimination Act in such manner as to open up services to older persons. If the *Grove City* decision should be applied to the act, it would mean it would be virtually impossible to convince the executive branch, let alone private institutions, that it should get off dead center as far as the implementation of this very important piece of legislation is concerned.

I am convinced that this legislation does only one thing and that is to put us back where we were as far as the administration of these four statutes are concerned prior to the *Grove City College* case. Let's get back to where we were and then insist on a far more effective and vigorous administration of these four statutes than has been the case in the past.

There is no justification—legally or morally—for the Federal Government to permit those who operate programs it supports to practice racism, sexism, ageism, or shut the doors of opportunity for the handicapped.

I urge this committee and the Congress to give the civil rights movement a shot in the arm by passing this bill by overwhelming majority.

Mr. EDWARDS. Thank you, Dr. Flemming.

[Prepared statement of Arthur S. Flemming follows:]

PREPARED STATEMENT OF ARTHUR S. FLEMMING

I appreciate very much the opportunity to appear before the Committees on Judiciary and Education and Labor in order to present my views on H.R. 5490, the "Civil Rights Act of 1984".

It is my understanding that this legislation is intended to restore four major civil rights statutes—title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the 1973 Rehabilitation Act, as amended in 1978; and the Age Discrimination Act of 1975—to the broad scope of coverage that was originally intended by Congress and that characterized their administration prior to this Supreme Court decision in *Grove City College* vs. *Bell*.

I support without reservation the enactment of this legislation. As we observe the 30th anniversary of *Brown* vs. *Board of Education* we know that there are many of our citizens who question the Federal Government's continuing commitment to the attainment of the objectives embodied in that landmark decision.

Until the decision of the Supreme Court in the *Grove City College* case it was assumed that if education institutions received financial assistance for any of its programs the entire institution would be subject to the provisions of title IX. However, as a result of the Supreme Court decision it is now assumed that if an educational institution receives federal financial assistance for just one program it can ignore title IX for all of its other programs. It is also assumed that this same line of reasoning would be used in determining the jurisdiction of the Federal Government under title VI of the Civil Rights Act of 1964, section 504 of the 1973 Rehabilitation Act, as amended in 1978 and the Age Discrimination Act of 1975.

If the Congress of the United States permits the enforcement of these laws to be based on such an assumption the citizens of our Nation will be convinced that the Federal Government has decided to walk away from the constitutional obligations defined in *Brown* vs. *Board of Education* and subsequent opinions.

If, on the other hand, the Congress takes prompt action to restore the situation under these four Acts to where it was prior to the Grove City decision it will convince the citizens of our nation that the Congress is determined to translate the rhetoric of the Constitution as interpreted by the Supreme Court into reality as far as the lives of those who have been and still are the victims of discrimination are concerned.

In my judgment the record of the executive branch in implementing civil rights laws in the area of the delivery of services has been on balance a poor one. If the Congress fails to respond to the *Grove City* decision it is clear that the nation will take a long backward step in this area. This cannot and should not be permitted to happen.

Title IX has been the catalyst for gains in achieving equal opportunities for women students and employees in schools and colleges across the nation. What has happened however simply constitutes a fair start. A great deal more remains to be done. If Congress does not respond to the *Grove City* decision we know that one institution after another will decide that it is no longer necessary to adjust their programs and administrative practices in order to meet the objectives of title IX.

Prior to the inclusion of title VI in the Civil Rights Act of 1964, racial discrimination in programs designed to provide health, welfare educational services to our people was rampant. Title VI prohibited such practices. Some of them have come to a halt as a result of the implementation of title VI. Many of these practices still continue. If the *Grove City* decision continues to be the law of the land we could very easily find ourselves reverting to the type of institutional discrimination that confronted us prior to 1964. How can we justify a policy that would say to institutions involved in federally-supported service programs in these areas: all you need to do is avoid discrimination in the areas where you receive Federal funds; you are free to practice discrimination at will in all others areas of your institution! We would not only be tolerating—we would be putting an official stamp of approval on discriminatory practices by institutions that are helping the Federal Government to discharge its responsibilities to its citizens.

We know that it has been necessary to combat institutional discrimination in institution after institution in connection with the implementation of section 504 of the 1973 Rehabilitation Act, as amended in 1978. This act has been and continues to be a challenge to the status quo. All kinds of reasons have been advanced by institutions for not complying with the provisions of the act. The Congress would certainly be replacing hope with despair in the lives of the handicapped if it permitted the *Grove City* decision to be applied to the enforcement of this very important piece of legislation.

In 1978, as a result of a directive from the Congress, the U.S. Commission of Civil Rights, which I was then serving as Chairman, conducted field studies and held public hearings to determine the extent to which ageism existed in the administration of programs financed by Federal funds. As a result of these studies and hearings, we concluded that discrimination on the basis of age was widespread and that these discriminatory practices were having an adverse impact on the lives of older persons. For example in the field of mental health we found that in community mental health clinics on an average only 4 or 5 percent of the total number of persons being served were over 65.

The executive branch has made very little progress in implementing the Age Discrimination Act in such manner as to open up services to older persons. If the *Grove City* decision should be applied to the act it would mean it would be virtually impossible to convince the executive branch that it should get off dead center as far as the implementation of this very important piece of legislation is concerned.

I am convinced that this legislation does only one thing and that is to put us back where we were as far as the administration of these four statutes are concerned prior to the *Grove City College* case. Let's get back to where we were and then insist on a far more effective and vigorous administration of these four statutes than has been the case in the past. There is no justification—legally or morally—for the Federal Government to permit those who operate programs it supports to practice racism, sexism, ageism or shut the doors of opportunity to the handicapped.

I urge this committee and the Congress to give the civil rights movement a "shot in the arm" by passing this bill by overwhelming majority.

Mr. EDWARDS. Our last member of the panel to testify, we are privileged to hear from Mary Futrell, president of the National Education Association.

STATEMENT OF MARY FUTRELL, PRESIDENT, NATIONAL EDUCATION ASSOCIATION

Ms. FUTRELL. Thank you very much, Mr. Chairman.

Mr. Chairman and members of the committee, my name is Mary Hatwood Futrell. I am president of the 1.7 million member National Education Association whose members are classroom teachers, educational support personnel, and higher educational faculty in each of these 50 States.

While it is generally a pleasure for me to testify before these two distinguished committees, I must begin my statement today by noting our deep regret over the fact that these hearings are so necessary. It has long been our hope that discrimination—in any form—would be a clear and unmistakable violation of the rights of our citizens and the laws of our land.

Yet, the recent U.S. Supreme Court decision in *Grove City* v. *Bell*—and the Reagan administration's intent to apply the High Court's ruling in this case to other civil rights laws—gives tragic illustration to both the need for constant vigilance over civil rights gains and the necessity for clear and unequivocal statutory language safeguarding the rights of all of our people.

For the NEA—which for many years has vigorously pursued the goal of equal opportunity for all and which was an amicus party in this case—the U.S. Supreme Court decision in *Grove City* was indeed abhorrent, undermining as it did the rights of our people and the intent of the Congress.

The effect of this ruling, which has narrowed interpretation of title IX's prohibition against sex discrimination in any educational institution receiving federal funds, is already being seen. As Ms. Goldsmith stated earlier, one Department of Education finding against the University of Maryland charging discrimination against women athletes was dropped within 2 weeks of the ruling with the Education Department citing the limiting nature of the *Grove City* case as its rationale.

The sad truth is that this instance will be but the first of many should the *Grove City* ruling be left to stand. The National Education Association does not believe that we as a nation can afford such backsliding in our quest for equal opportunity.

It is, therefore, imperative that the Congress take immediate and decisive action to pass—without amendment—the Omnibus Civil Rights Act of 1984, H.R. 5490.

Mr. Chairman, the original intent of title IX was clear: to eliminate discrimination in education on the basis of sex. This was the purpose when this provision was first enacted over a decade ago. It was the intent reconfirmed by the U.S. House of Representatives by a vote of 414 to 8 as recently as November of last year. And it has been the practice of all previous administrations in carrying out the law.

As a result, the years subsequent to the enactment of title IX of the Education Amendments of 1972 have brought significant gains for women in education.

For example, the number of women participating in intercollegiate athletics at NCAA member institutions has increased twofold since 1972; the percentage of women in vocational education has edged up; by 1982, 10 years after enactment, 15,000 college sports scholarships were offered to women—an unheard of quantity before title IX; and women are earning a greater percentage of the graduate and professional degrees granted in traditionally male fields.

Even with these gains, however, severe and continuing problems remain. Women are still grossly underrepresented in all higher faculty ranks at both private and public institutions of higher learning.

As we began this decade, the budget for women's athletic programs was still a paltry 16 percent of the total athletic budget, even though women comprised nearly a third of all intercollegiate athletes. And women have not made great inroads into postgraduate study in the physical sciences. In 1980–81, for example, women earned only about one-fifth of the master's degrees granted in the physical sciences.

Clearly, our fight to end sex discrimination in education—and in our society at large—is far from over. These statistics, and others, underscore the need for passage of the equal rights amendment [ERA]. But instead of bolstering our civil rights stance, the fight for equality for all becomes more difficult with the *Grove City* ruling in place. This is precisely why the Omnibus Civil Rights Law of 1984 must become the law of the land.

The seriousness and immediacy of this situation is compounded by the effect of this case on the guarantees afforded by other civil rights statutes. The problems it creates go well beyond the single, and important, question of discrimination based on sex.

The Supreme Court ruling in *Grove City* will have a spillover effect on other civil rights statutes since the wording and the intent of the language in title IX are based on title VI of the 1964 Civil Rights Act, and are similar to Federal laws prohibiting discrimination based on disability section 504 of the Rehabilitation Act of 1973—and age—the Age Discrimination Act of 1975. This seriously jeopardizes enforcement of all of these laws and undermines the rights of countless Americans.

Each of these statutes has been of critical importance in the quest for true equality of opportunity for all of our citizens. Title VI has been a necessary and potent vehicle for eradicating racial discrimination at all levels of American education and life.

Indeed, the importance of title VI has underscored in a major report NEA released last week—"Three Cities That Are Making Desegregation Work"—a report that details the gains from eliminating racial segregation in public schools in the three decades since the *Brown* v. *Board of Education* decision.

Likewise, section 504 of the Rehabilitation Act has meant that many Americans, including teachers and students, no longer face unnecessary barriers to their participation and advancement in our society. And the Age Discrimination Act has opened opportunities throughout the span of life.

Yet each of these statutes is now in jeopardy. This simply cannot be countenanced.

Passage of the Omnibus Civil Rights Act of 1984 would again safeguard the rights of women, minorities, the disabled, and the elderly. In so doing, it would, in the words of one of the bill's Senate sponsors, Edward Kennedy of Massachusetts, "restore common sense to the law."

Mr. Chairman, we urge you and the members of these committees to continue the leadership you have already demonstrated on this vital bill and to make it the law of the land.

We urge you to act at the soonest possible moment to restore the congressional intent of broad, comprehensive, and effective civil rights statutes.

While H.R. 5490 will have far-reaching effects, its language is not complex. It merely proposed changes in the language of four major civil rights laws: title VI of the Civil Rights Act of 1974, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, restoring their enforcement mechanisms to pre-*Grove City* days.

First, the bill would eliminate references to "program or activity," the words on which the *Grove City* interpretation hinged. This would mean that, once again, an entire institution or entity would be prohibited from discriminating when any of its parts receive Federal funds.

As educators, we know that no single classroom can be immune in a discriminatory environment. Discrimination simply cannot be isolated; it must be eradicated in its entirety.

Second, the term recipient would be added to each of the civil rights laws, making their language consistent with that already in the regulations governing these laws.

And finally, H.R. 5490 would clarify the enforcement section of each of the civil rights laws so that agencies could terminate all the Federal financial assistance supporting discriminatory practices, while at the same time reaffirming the legal safeguards available to those facing the prospect of fund cutoff.

It is clear that despite the assertion of Reagan administration officials that H.R. 5490 will greatly expand the intent of the civil rights laws, it will do no such thing. It will simply keep their meaning and purpose intact.

If the Reagan administration were really concerned about the maintenance of strong civil rights protections in this Nation, it would never have urged the Supreme Court to dilute the title IX protections. Its actions before the Court were unconscionable, evidencing a callous disregard for the intent of Congress and the rights of women. Nothing less than its full and vigorous support of H.R. 5490 is now demanded.

Mr. Chairman and members of the committees, the National Education Association urges immediate passage and enactment of the Omnibus Civil Rights Act of 1984 to be essential. It is the most important civil rights legislation now facing the Congress.

Its passage will keep the *Grove City* case from further damaging the civil rights of millions of our citizens. Indeed, it will prove an invaluable weapon in the protection of all of our citizens.

[Prepared statement of Mary Hatwood Futrell follows:]

PREPARED STATEMENT OF MARY HATWOOD FUTRELL, PRESIDENT, NATIONAL EDUCATION ASSOCIATION

Mr. Chairman and Members of the Committees: My name is Mary Hatwood Futrell. I am president of the 1.7 million member National Education Association (NEA) whose members are classroom teachers, educational support personnel, and higher education faculty in each of these fifty states.

While it is generally a pleasure for me to testify before these two distinguished Committees, I must begin my statement today by noting our deep regret over the fact that these hearings are so necessary. It has long been our hope that discrimination—in any form—would be a clear and unmistakable violation of the rights of our citizens and the laws of our land. Yet the recent U.S. Supreme Court decision in *Grove City* v. *Bell*—and the Reagan Administration's intent to apply the High Court's ruling in this case to other civil rights laws—gives tragic illustration to both the need for constant vigilance over civil rights gains and the necessity for clear and unequivocal statutory language safeguarding the rights of all of our people.

For the NEA—which for many years has vigorously pursued the goal of equal opportunity for all and which was an amicus party in this case—the U.S. Supreme Court decision in *Grove City* was indeed abhorrent, undermining as it did the rights of our people and the intent of the Congress. The effect of this ruling, which has narrowed interpretation of Title IX's prohibition against sex discrimination in any educational institution receiving federal funds, is already being seen. One Department of Education finding against the University of Maryland charging discrimination against women athletes was dropped within two weeks of the ruling with the Education Department citing the limiting nature of the *Grove City* case as its rationale. The sad truth is that this instance will be but the first of many should the *Grove City* ruling be left to stand. The National Education Association does not believe that we as a nation can afford such backsliding in our quest for equal opportunity.

It is therefore imperative that the Congress take immediate and decisive action to pass—without amendment—the Omnibus Civil Rights Act of 1984, H.R. 5490.

Equal Educational Opportunity Laws Must Be Upheld

Mr. Chairman, the original intent of Title IX was clear: to eliminate discrimination in education on the basis of sex. This was the purpose when this provision was first enacted over a decade ago. It was the intent reconfirmed by the United States House of Representatives by a vote of 418 to 8 as recently in November of last year. And it has been the practice of all previous Administrations in carrying out the law.

As a result, the years subsequent to the enactment of Title IX of the Education Amendments of 1972 have brought significant gains for women in education. For example, the number of women participating in intercollegiate athletics at NCAA member institutions has increased two-fold since 1972; the percentage of women in vocational education has edged up; by 1982, ten years after enactment, 15,000 college sports scholarships were offered to women—an unheard of quantity before Title IX; and women are earning a greater percentage of the graduate and professional degrees granted in traditionally male fields. Mr. Chairman, Title IX has made a real and marked difference in the lives of millions of women and girls.

Even with these gains, however, severe and continuing problems remain. Women are still grossly underrepresented in all higher faculty ranks at both private and public institutions of higher learning. As we began this decade, the budget for women's athletic programs was still a paltry 16 percent of the total athletic budget, even though women comprised nearly a third of all intercollegiate athletes. And women have not made great inroads into postgraduate study in the physical sciences. In 1980-81, for example, women earned only about one fifth of the master's degrees granted in the physical sciences.

Clearly, our fight to end sex discrimination in education—and in our society at large—is far from over. These statistics, and others, underscore the need for passage of Equal Rights Amendment (ERA). But instead of bolstering our civil rights stance, the fight for equality for all becomes more difficult with the *Grove City* ruling in place. This is precisely why the Omnibus Civil Rights Law of 1984 must become the law of the land.

ALL CIVIL RIGHTS LAWS MUST BE PROTECTED

The seriousness and immediacy of this situation is compounded by the effect of this case on the guarantees afforded by other civil rights statutes. The problems it creates go well beyond the single—and important—question of discrimination based on sex. The Supreme Court ruling in *Grove City* will have a spillover effect on other civil rights statutes since the wording and the intent of the language in Title IX are based on Title VI of the 1964 Civil Rights Act, and are similar to federal laws prohibiting discrimination based on disability (Section 504 of the Rehabilitation Act of 1973) and age (the Age Discrimination Act of 1975). This seriously jeopardizes enforcement of all of these laws and undermines the rights of countless Americans.

Each of these statutes has been of critical importance in the quest for true equality of opportunity for all of our citizens. Title VI has been a necessary and potent vehicle for eradicating racial discrimination at all levels of American education and life. Indeed, the importance of Title VI was underscored in a major report NEA released last week—"Three Cities That Are Making Desegregation Work"—a report that details the gains from eliminating racial segregation in public schools in the three decades since the *Brown* v. *Board of Education* decision.

Likewise, section 504 of the Rehabilitation Act has meant that many Americans—including teachers and students—no longer face unnecessary barriers to their participation and advancement in our society. And the Age Discrimination Act has opened opportunities throughout the span of life.

Yet each of these statutes is now in jeopardy.

This simply cannot be countenanced.

Passage of the Omnibus Civil Rights Act of 1984, which has gained broad bipartisan support in both the House and the Senate, would again safeguard the rights of women, minorities, the disabled, and the elderly. In so doing, it would—in the words of one of the bill's Senate sponsors, Edward Kennedy of Massachusetts—"restore common sense to the law."

Mr. Chairman, we urge you and the Members of these Committees to continue the leadership you have already demonstrated on this vital bill and to make it the law of the land. We urge you to act at the soonest possible moment to restore the Congressional intent of broad, comprehensive, and effective civil rights statutes.

While H.R. 5490 will have far-reaching effects, its language is not complex. It merely proposes changes in the language of four major civil rights laws—Title VI of the Civil Rights Act of 1974; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; and the Age Discrimination Act of 1975—restoring their enforcement mechanisms to "pre-*Grove City* days".

First, the bill would eliminate references to "program or activity," the words on which the *Grove City* interpretation hinged. This would mean that, once again, an entire institution or entity would be prohibited from discriminating when any of its parts receive federal funds. As educators, we know that no single classroom can be immune in a discriminatory environment. Discrimination simply cannot be isolated; it must be eradicated in its entirety.

Second, the term "recipient" would be added to each of the civil rights laws, making their language consistent with that already in the regulations governing these laws.

And finally, H.R. 5490 would clarify the enforcement section of each of the civil rights laws so that agencies could terminate all the federal financial assistance supporting discriminatory practices, while at the same time reaffirming the legal safeguards available to those facing the prospect of fund cutoff.

It is clear that despite the assertion of Reagan Administration officials that H.R. 5490 will greatly expand the intent of the civil rights laws, it will do no such thing. It will simply keep their meaning and purpose intact.

If the Reagan Administration were really concerned about the maintenance of strong civil rights protections in this nation, it would never have urged the Supreme Court to dilute the Title IX protections. Its actions before the Court were unconscionable, evidencing a callous disregard for the intent of Congress and the rights of women. Nothing less than its full and vigorous support of H.R. 5490 is now demanded.

CONCLUSION

Mr. Chairman and Members of the Committees, the National Education Association urges immediate passage and enactment of the Omnibus Civil Rights Act of 1984. It is the most important civil rights legislation now facing the Congress. Its passage will keep the *Grove City* case from further damaging the civil rights of millions of our citizens. Indeed, it will prove an invaluable weapon in the continuing struggle for equal rights under the law for all.

NEA stands ready to help in this effort in any way possible.

Thank you very much.

Mr. **Edwards**. Thank you very much, Ms. Futrell.

The gentleman from Arizona, Mr. McCain.

Mr. **McCain**. Thank you, Mr. Chairman. I have no questions.

I would like to thank the panelists for taking their very important time in sharing their views with us this morning on this important piece of legislation. I would like to express my appreciation to you, sir, for holding these hearings and inviting us.

Mr. **Edwards**. Thank you, Mr. McCain.

Does the gentleman from Texas, Mr. Bartlett, have questions?

Mr. **Bartlett**. Thank you, Mr. Chairman.

I do appreciate the chairman holding these hearings. I think they are very useful and beneficial hearings. I have reviewed the testimony of the witnesses. It is quite good testimony, and very helpful.

I do have some questions I suppose, as to how it would work, for Ms. Futrell. The text of your remarks, I wanted to clarify. Was it your intent to urge that the legislation be approved with no amendments, the committee process of Congress not being permitted to consider the legislation carefully and decide if there are ways to improve it? Was that your serious suggestion, that we not be permitted to make any amendments to the legislation?

Ms. **Futrell**. We would strongly urge that the bill be passed as currently printed. We do not feel that there is a need for additional language; that the bill as it is does not need to be amended. If the Congress believes that it can strengthen the bill with additional amendments, then obviously we would be willing to consider those amendments. But we believe it is quite strong as is.

Mr. **Bartlett**. So you would be willing, just as one constituent organization, to look at any amendments and to let the committees of Congress consider any amendments if we thought them to be in the best interest of the public?

Ms. **Futrell**. Assuming those amendments would strengthen and not weaken the bill. But as written we believe it would satisfy the purpose of restoring the language to the intent for which it was put forth.

Mr. **Bartlett**. On the essential subject of recipient, including or broadening the language of these bills to include both the enforcement as to recipients and not just programmer activity, I wanted to ask Dr. Flemming in particular if the term "recipient" then is substituted for the phrase "program or activity?" I wonder if you could detail for us what, if any, changes this would have on the wording or implementation of current regulations?

The *Grove City* case is rather new. New regulations haven't been implemented as a result. Would you see changing regulations, a need to change regulations to implement this statutory change? If so, what changes?

Mr. **Flemming**. First of all, may I say that as I understand it this committee either has or will receive testimony from lawyers who have followed the evolution of all these laws, and have followed the rules and regulations very carefully.

My understanding is that if this bill is passed it will put us back where we were before the *Grove City* decision, and will make it possible for us to take the rules and regulations as they had developed up to that particular point and continue to implement those rules and regulations. And I feel that that is the objective that should be kept in mind.

I don't think that this legislation should be used as a vehicle to change any of these laws, other than to get us back to where we were before the *Grove City* decision, so as to make it abundantly clear that no institution in this country can get by with simply complying with any one of these laws in connection with a particular program and then violate any one of the laws as far as the rest of the institution is concerned.

The greatest evil that we have to deal with in the whole field of civil rights is institutional discrimination. The *Grove City* decision undermined our efforts to deal with institutional discrimination. The thing I am interested in is to see Congress put us back where we were prior to that decision so we can move from that point in implementing all of these acts.

Mr. BARTLETT. Mr. Chairman, I wonder if any of the other witnesses have an opinion as to whether it is their intent to have H.R. 5490 moved beyond where we were prior to *Grove City*, or simply move us back in litigation and relations prior to *Grove City*.

Ms. FUTRELL. It is the intent of the NEA that the latter part of your statement be the the case. That that language would place us where we were prior to the *Grove City* decision.

Mr. KEMP. National Easter Seal Society supports that very simple contention of the National Education Association.

Mr. GOLDSMITH. As does the National Organization for Women. The idea is to recoup the ground lost through the *Grove City* decision.

Mr. HOOKS. I think that would be a fair statement of the NAACP. Obviously, the thing that is most shocking and frightening to us is here we are 119 years after the adoption of the 14th amendment still having to pass laws to simply grant citizens the rights they ought to have. If that could be strengthened, obviously we would have a principal favorite. But if we could in this legislation recoup the ground lost in the *Grove City* case, it would be a dramatic move forward.

I was somewhat reluctant to answer that fully because I shall not forget in the voters' rights case any statement we made saying we wanted to see the Voting Rights Act extended was used as a negative to say, well, it shouldn't be strengthened; nobody wants it strengthened, we just want it retained.

I will never make a statement I don't want anything strengthened. But the intent of our testimony is to support this bill, which we think does the job we came here for. If Congress in its wisdom sees fit to go further and do more, we would not be opposed. But at the present time we are pushing for what we have before us. If you want to add more, why, lay on back there.

Mr. BARTLETT. The language of H.R. 5490 has some language that is taken directly, apparently, out of the—in the definition of "recipient," which is taken directly out of the regulations, not been in statute prior to that. Is it your understanding that "successor" or "transferee" should be interpreted to mean other organizations that receive money or services from institutions or agencies, or is it strictly within that institution?

What I am getting at is sometimes a city or local government will receive funds, that they are simply conduits and they go right through to the local water district or something like that. And then if the water district is found to be out of compliance, these laws would apply to the water district.

But does that imply termination of funds for the city itself for other organizations even though they have no control over the water district? I am trying to clarify your intent.

Mr. FLEMMING. My understanding is that the language of this proposed legislation does not broaden the jurisdiction beyond what it was under the laws and the regulations. For example, certainly, if a grant is made to a public institution of higher learning, grant made to the University of Oregon that I had the privilege of serving as president, that does not bring in under the implementation of the law all of the State government of the State of Oregon automatically.

Now, State government gets a lot of other grants from the Federal Government and is subject to these laws because of other grants it gets. But a grant to the University of Oregon does not automatically involve all of the rest of the State of Oregon. That was the situation before the *Grove City* decision under those regulations.

My understanding, there is nothing in the language that would change that situation, expand that jurisdiction.

Mr. BARTLETT. Did anyone else want to add to that?—because I have an additional question. My time is running, I realize.

Mr. EDWARDS. Go ahead.

Mr. BARTLETT. My additional question, I wanted to make sure I understand the intent. We had some responses on this last week from the panel, also. I wanted to make sure I understand the intent of the witnesses this morning.

Is it then your intent that—and I am putting this in layman's language and you can rephrase my question however you would choose. Is it your intention, then, that the coverage of these laws would be applied institutionwide, but the fund termination as a penalty—this is what I am getting to—do you envision the termination of Federal funds as a penalty to apply to the particular program that is out of compliance? Or do you intend the termination as a remedy applied to that entire institution?

I could give examples. When I was on the City Council of Dallas, for example, I recall we grappled with section 504. I am a very strong supporter of 504. We tried to implement the intent, as well as the letter—but the intent, spirit of 504, as rapidly as we could. But there were then, and are today, some buildings in the city which are not handicapped accessed. As a result, any time we would receive Federal funds to renovate those buildings, we would, and I believe we would have done it whether or not the Federal law was there. I am thankful the Federal law was there so we didn't have a decision to make. We would renovate the buildings to make them accessible.

My question is: With those inaccessible buildings being owned by the city, would it be your intent to have 504 apply to then eliminate general revenue sharing to the city as a whole, or would it be only as a remedy?

Mr. **Flemming**. It is my understanding that if this bill is enacted into law, it would not change the fund termination provisions as they existed prior to *Grove City* at all.

Mr. **Bartlett**. Tell us what your understanding of those fund terminations are.

Mr. **Flemming**. Well, they are clearly set forth in the law, I mean as it existed prior to that time. The entire institution—I will take an educational institution. The entire institution was subject to the laws and was under an obligation to adhere to the laws. But when it came to fund termination, you focused in on the particular program within the institution where there was a violation of the law. That is where you terminated your funds.

Mr. **Bartlett**. So you would have us——

Mr. **Flemming**. I am not—my understanding is that those who drafted this law have drafted it in such a manner as not to change the situation as it existed prior to *Grove City*. I might have ideas on that for the future. But my feeling is that there should not be any change in the situation as it was prior to *Grove City*. We have one objective in mind here; that is, to get back to where we were prior to *Grove City*.

I am sure I will be before these committees in the future asking for additional changes in some of these laws. Age Discrimination Act—I have got some ideas on how to strengthen that one—we haven't gone very far—but I am not going to advance them at this time. I am interested in only one thing. That is to get back where we were prior to *Grove City*. I don't want to see any change.

Mr. **Bartlett**. Thank you. Mr. Kemp.

Mr. **Kemp**. Yes. I think your question is one that is intriguing in that I believe that we do support—National Easter Seal Society supports a broad interpretation of "recipient" and not focusing on flow of moneys to a program or activity. On the one hand, it might be a factual question to ask, is the money flowing directly to a program or the recipient? The recipient, as a whole, is responsible to comply with the various civil rights laws.

In terms of termination of funding, I think there should be a nexus drawn between the Federal money flowing and the discriminatory act or omission that causes discrimination to occur. Thus, there would be a narrow interpretation for termination. You would construe that very narrowly. Just the program activity would be terminated.

On the issue you raise about the inaccessible buildings in Dallas, I am somewhat familiar with Dallas, to comply with 504, and I commend the city for its efforts. Many cities find themselves in the same situation that you found Dallas dealing with, cities that are with buildings that are old and inaccessible. It is not the intention under 504 to require all buildings to be made accessible, but the programs and activities within those buildings to be made accessible.

Change in terms of accessibility to availability might be acceptable. Accessibility connotes architectural and design changes. Program availability means the program is made available to the person, doesn't necessarily have to be housed in an accessible building. If a person who cannot enter that building wishes to participate in that program, the program can be relocated to another site so the individual can receive the benefit of the service of the program.

Mr. **Bartlett**. You have obviously seen our new recreation center at Backman Lake, then, which was precisely what happened. It was almost as a magnet center where we made one entire recreation center, perhaps the first city in the country to do it, or one of the first to do it, to be specially designed for maximum accessibility to the handicapped, and then put a large number of the programs there.

In the meantime, however, because of 504 the city continued to upgrade and make more accessible. As we renovated each recreation building or built new buildings, we made those accessible, too.

I appreciate your testimony and wanted to clarify that it is the intention of this bill to continue that as opposed to doing something in addition affecting other Federal funds.

Any of the other witnesses have comment on that?

Thank you, Mr. Chairman, for your patience.

Mr. **Edwards**. Well, that was very helpful dialog.

Mr. Hooks, last week we heard from officials of private colleges who suggested that in the light of *Grove City* a number of colleges may just say we don't want to accept basic education opportunity grant students, that this is such a burden, we have never discriminated. This is what these college presidents said: We have never been accused of discriminating but now you have come along and said we have to sign these papers, and so forth. So perhaps rather than go along with it, we just won't accept these students that have this assistance.

How do you respond to that?

Mr. **Hooks**. I think, Mr. Chairman, the difficulty of enforcing any law, of living in a civilized society, requires some adjustment. These more than 30 years now that I have been involved in trying to pursue civil rights enforcement and remedies, I can recall when people said to us, you know, Negroes don't really just want to sit anywhere on the bus; what they really want to do is drive the bus. In fact, they may be subversive enough to want to own buses, can you imagine that? So they would fight against us sitting where we wanted because of what would come down the line.

But I think it is important in this instance to keep our eye sort of on the ball to what we are trying to do to restore the Grove City-type of thing, the concepts of pinpointing and so forth may be a subject of something else later. But at this point I would hate to see a private college that is barely existing now go out of business because they didn't want to obey the regulations.

But if that is what it is, so be it, as long as it does not end up in racial discrimination. I have a rather liberal view that the average college is not in a position to refuse money because they may have to obey some regulation which is legal, which was moral to begin with as far as I am concerned. So I don't put too much credence, too much faith in this concept that is so difficult.

I spent some years in FCC. We had an instance of a radio station operator come to one of these committees—he had a stack of paper seven pages high—saying this is what I have to do to get a license.

I don't know what all those papers were, but it made the headlines everywhere because it was so dramatic. It was also untrue. Absolutely untrue. I think these kind of horror stories, as I perceive it, that when you have to obey a Federal regulation, I suppose none of us want to obey them if we don't have to, including filing income taxes. But it is a requirement and we do it, however reluctantly.

Mr. Edwards. Thank you, Mr. Hooks.

Dr. Flemming, some people might say and have said that, look here, one department in a big university is discriminating and here Uncle Sam comes along and cuts off all Federal funds. Therefore, a lot of minority students don't get their shot. Young, disadvantaged women are not allowed to take advantage of these Federal programs. How do you respond to that? Is there great danger there?

Mr. Flemming. Mr. Chairman, that of course is the issue that confronts us when we apply the kind of sanctions that have been written into law, whether it is title VI, whether it is the Age Discrimination Act or the other acts that are involved. But I have long felt that if we carried forward a vigorous program of enforcement and applied the sanctions in one or two cases, we wouldn't have to apply them in many other cases.

The message would get across to educational institutions and other institutions in our society that the executive branch of the Government meant business, and that it really was going to implement the Constitution and the laws that had been passed under the Constitution. So that in the long run many, many minorities and other groups in our society would benefit as a result of the willingness on the part of an administrator in the executive branch to bite the bullet. I think that bullet has not been bitten as often as it should have been in this whole area of the delivery of services.

Mr. Edwards. What you are saying is that it has been the law for quite a while and it hasn't happened, either.

Mr. Flemming. At the end of my prepared testimony I tried to indicate we should try to get back where we were prior to *Grove City*. Then the pressure should be on the executive branch to take the law as it was prior to *Grove City* and really go to work to implement it, enforce it. I don't believe that there has been the kind of enforcement of these laws that we should have had. *Grove City* will simply give some people an excuse to walk away from their enforcement responsibilities. We get back to where we were prior to *Grove City*.

We are in a position where we can once again put the pressure on and insist on the enforcement of the law as it existed prior to *Grove City*. This is what we need, if we are going to really lick institutional discrimination. And that is the big issue that confronts us at the present time in the areas that we have under discussion, as well as in the area of employment.

Mr. Edwards. Thank you. Ms. Goldsmith, I believe your testimony is to the effect that the effects of the *Grove City* decision are already being felt in a most serious manner, is that correct?

Ms. Goldsmith. That is correct. We have at least the two incidences I referred to in my testimony. I am sure there are others we haven't heard of yet. When the *Grove City* decision came down, and we did a press conference talking about the devastating impact of this decision and what it was likely to be on girls and women in education, one of the questions was, well, do you really think seriously that now there is going to be a serious problem with discrimination in educational institutions?

We responded by saying, well, you know it is never quite that simple. And I don't believe that a lot of administrators are going to go into their offices tomorrow and say, oh, God, now we can start discriminating against girls and women. But I do think that no when it becomes difficult to offer equal or equitable opportunities to women, that we won't do it. That when there is a budget crunch and they can't find the money for the necessary programs, that they won't do it. And we are starting to see that. We are likely to see a good deal more, unless we pass the legislation that is before us.

Mr. EDWARDS. Are there further questions of the panel? Well, all members of the panel, you have been very, very helpful. It is an extraordinary group of witnesses. We thank you very much.

The next panel can come to the witness table: Mr. Gerry and Mr. Rhinelander.

[Pause.]

Mr. EDWARDS. The subcommittee will come to order.

The second panel are both former officials of the Department of Health, Education, and Welfare. Both of these witnesses are experts with the enforcement scheme which this bill seeks to codify.

Our first witness will be Mr. Martin A. Gerry, who was the Office of Civil Rights Director from 1973 to 1977. After Mr. Gerry testifies, we will hear from Mr. John B. Rhinelander, who was general counsel for HEW from 1973 to 1975.

We welcome both of you gentlemen. Without objection your full statements will be made a part of the record.

Mr. Gerry, you may proceed.

STATEMENTS OF MARTIN A. GERRY, ESQ., FORMER DIRECTOR, OFFICE OF CIVIL RIGHTS; AND JOHN B. RHINELANDER, FORMER GENERAL COUNSEL, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Mr. GERRY. Thank you, Mr. Chairman. With your permission I would like to just read my statement, which is fairly short and I think pretty much summarizes my views.

Mr. Chairman and members of both committees, I first would like to express my appreciation to the chairmen and members of both committees for their invitation to appear this morning at a joint hearing convened to consider H.R. 5490, the Civil Rights Act of 1984. It is a particular pleasure to appear together with my friend and former colleague at the Department of Health, Education, and Welfare, John Rhinelander. I have read the statement submitted by Mr. Rhinelander to the committees this morning and I find it to be an excellent and thorough discussion of the policy and legal history surrounding the development by the Department of the title IX regulation.

I am not going to comment on it further because I think it stands as an excellent record of those proceedings.

Before commenting on the effect and merits of H.R. 5490, I would like to summarize my background and experience during the past

15 years with the interpretation, administration and enforcement of Federal civil rights laws. I think specifically I will concentrate on the four statutes which are directly affected by the proposed legislation: title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975.

During 8 of these years—1969-77—I served in a variety of civil rights policy development and policy-making positions within the office for civil rights and on the staffs of HEW Secretaries Elliot Richardson and Caspar Weinberger. In 1975 I was appointed Director of the Office for Civil Rights by President Ford and served in that capacity until January 1977. In this capacity I was responsible for the overall administration of title VI, title IX and section 504 within the Department. The way we had actually function was we had an office of general counsel and we had an office for civil rights. At that time the two offices, sort of working together, were the policy interpretation responsibilities for the Secretary.

During the past 7 years—1977-84—my experience with the interpretation and application of these and other civil rights laws has broadened in three related but different ways. Since March 1977 I have served as special counsel to the Wednesday Group of the House of Representatives and have been actively involved with several members of the group in the evaluation and preparation of a wide variety of civil rights legislation. In 1982-83 I also served as co-chair of a commission charged by the Subcommittee on Select Education of the Committee on Education and Labor with analyzing and reporting on a variety of issues related to the financing and administration of special education programs under the Education for All Handicapped Children Act.

During this period of service with the Wednesday Group I have probably been involved with most of the civil rights legislation that has come before the committee and am fairly familiar with the changes that have occurred and probably concerns at least as many members of the committee with regard to the reach and meaning of the Federal civil rights laws.

During these same 7 years I have provided extensive legal and consultative assistance to over 35 State agencies and to scores of local agencies seeking to implement and comply with Federal civil rights laws. I have drafted State laws and regulations, developed inter-agency agreements, designed State health and education financing systems, and trained State and local government officials in both civil rights policy development and in the monitoring of civil rights compliance.

Finally, over the last 7 years I have had occasion both to represent parent and advocacy organizations in Federal court litigation and to serve as an expert/consultant on Federal civil rights law and policies with several U.S. district courts. I served as a special master for two U.S. district courts in civil rights cases.

After carefully reviewing the provisions of H.R. 5490 as well as the recent decision of the U.S. Supreme Court in *Grove City* v. *Bell*, 52 USLW 4283—February 28, 1984—and on the basis of my experience and my understanding of the Supreme Court's decision in the *Grove City* case, I am convinced that the prompt passage of H.R. 5490 is of crucial importance. Without this action, the vitality, integrity and rational application of four civil rights which together represent a major portion of the Federal statutory commitment to equal opportunity and social justice for all Americans will be mindlessly sacrificed. I believe that H.R. 5490, when enacted, will do no more than restore the legal and administrative interpretations relied upon by the Johnson, Nixon, Ford, and Carter administrations concerning the jurisdictional reach and sanctions available under these statutes.

I am also and equally convinced that absent prompt passage of H.R. 5490 the implications of the *Grove City* decision for the actual administrative operation of both Federal departments and regulated agencies and organizations are frightening. The increased administrative and accounting burdens on regulated agencies, the new intrusion of Federal civil rights agencies into the detailed financial operations of those agencies, and the inevitable increase in private civil rights litigation would be unavoidable by-products of the *Grove City* decision. Thus, not only would the approach arrived at by the Supreme Court weaken and ultimately frustrate the administration and enforcement of current non-discrimination provisions, but it would also result in a Federal interference in the daily operations of thousands of State, local and private agencies and organizations in a way previously unimaginable.

Finally, I can discern no basis under either a rational or moral social policy for adopting the narrow approach to civil rights jurisdiction dictated by the definition of "program or activity" adopted in the *Grove City* decision. I do not believe that the Congress ever intended such a narrow interpretation and it is frankly ludicrous on its face to adopt a position that so long as women are not discriminated against in the administration of federally supported student financial assistance programs, it is not unlawful for the same women to be discriminated against either in the underlying admissions process or even in all aspects of post-admission treatment. That to me is an absolutely ridiculous social policy, whether or not it was an appropriate legal position. Perhaps most important, I believe that the American people continue to possess that basic sense of fairness and justice which has always provided the structure for social and legislative progress. In my judgment, H.R. 5490 provides the Congress with a simple, straight-forward and now crucially needed vehicle to reestablish a fair and just approach to the administration of Federal civil rights laws.

Thank you.

Mr. Edwards. Thank you, Mr. Gerry.

Mr. Rhinelander.

Mr. Rhinelander. Mr. Chairman, members of the subcommittee, I have prepared a too lengthy document which I will just submit for the record. I am prepared to go to questions right now or I can summarize a few points if you would like from my statement.

Mr. Edwards. Yes, please.

Mr. Rhinelander. I would like to make very clear from the beginning that I was delighted to work with Martin Gerry which was general counsel of HEW from 1973 until 1975. I have not had the continuing experience in the civil rights field that he has had.

My testimony is really a snapshot of those years at HEW. I was there when the title IX regulations were first proposed. We were

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working on them through the point of final publication, and coming up before the committees of the House and Senate under the oversight provisions that were in effect at the time.

I think most important from the point of view of this commitee is my judgment that H.R. 5490 would amend title IX in particular to provide the statutory base which we had assumed, after really quite a bit of legal research back in 1973 through 1975—assumed that Congress had originally given to us in title IX.

More specifically H.R. 5490 would overrule the program-specific dictum in Justice Blackmun's opinion in the *North Haven* case and holding in Justice White's opinion in *Grove City*. In fact H.R. 5490 would substitute language drawn in large part as I can determine from the title IX regulations themselves and put that into statute.

Let me make a few comments on the development of title IX regulations, because it was, I think, an extraordinary exercise in the informal rulemaking process. The two major participants in the Department at the present time were the Office of Civil Rights where Martin Gerry was deputy of Office of General Counsel. And I was the general counsel for those 2½ years.

The Office of General Counsel conducted exhaustive research into the—particularly into—well, I won't say exhaustive research into title IX, the legislative history of title IX was scarce. We have to accept and admit that. There was enormous research into title VI, its history, case law, under both title VI and the 14th amendment.

Issues were identified and taken to the Secretary before we proposed regulations. There were clashing views both within the Department among many interest groups and among Members of Congress as to the proper scope of title IX. The Office of General Counsel provided legal analysis to each of the options that went up to the Secretary. Regulations were published in proposed form in June 1974. The Department received, as I recall, over 10,000 written comments which at that time was the largest number of comments received in HEW on any of its regulations.

They were systematically examined. Marty Gerry and others in his office conducted town meetings around the country. The net effect was that regulations were revised, were submitted to the White House because under the law, the President himself had to approve the regulations, which he did in late May 1975. And the regulations were published.

Then we appeared—under the law applicable to HEW's education regulations there was a legislative veto provision. The regulations were submitted to both House and Senate. We appeared, I can recall, before the House. The net effect was that the regulations went into effect as they had been proposed.

Let me make several points in terms of the scope of the law, because I think it is terribly important for those of you considering the legislation before you. In enacting title IX, Congress clearly acted with the broadest brushes. It used title IV as the legislative model, basically marking out and substituting language.

Unlike title VI, which had regulations and literally hundreds of case laws which had been decided under the Constitution and under title VI itself, there was very little case law in the sex discrimination area under the 14th amendment. What there was was really evolving during those early years of 1970. Secretary Weinberger, who was at HEW which was there, decided—supported both by Martin Gerry's office and my office—that HEW should issue detailed regulations to provide guidance to everybody who was concerned, institutions, individuals and also to provide guidance to the regional office of HEW so that there would be uniform understanding and enforcement.

Title IX, as originally enacted by Congress had five statutory exemptions. During the course of the development of the regulations, we determined that certain institutions or programs would be covered by the literal language of the regulations unless there was a statutory exemption.

The Boy Scouts and Girl Scouts are just two that come to mind right now. If I recall, the Girl Scouts, I believe, had something like a $1.5 million education program that literally fell under the literal language of the program. So in the course of the next 2 or 3 years there were further exemptions enacted in the statute to carve out of title IX areas where it clearly was not intended to apply.

It is obvious, but I should repeat it, that title IX regulations were highly controversial at the time. They included subjects such as sex education classes, physical education, housing, medical benefits, foreign scholarship programs including the Rhodes scholarship and above all, athletics and athletic scholarships.

About half of the comments that came to the Department during that period of time, about 5,000 dealt with the athletic question. After considerable analyses, concern for first amendment questions, the Secretary decided, and I felt he was on good solid ground, that curriculum should not be covered by the title IX regulations.

The interest groups were basically split. Some of them felt very strongly that curriculum should be covered because of the stereotype problem, but we felt it was very important it be excluded and the Secretary decided it should be.

Finally, and I think most important for your purpose, the scope of the issues under title IX was based on the conclusion that section 901, which is the coverage section, apply to a recipient if the education program benefited directly or indirectly from Federal financial assistance. HEW knew at the time, as did Members of Congress, that controversial programs such as athletics and athletic scholarships received no direct Federal funds and were supported oftentimes either by institutional or private funds, booster clubs and the like.

If a program specific rather than an institutional approach should have been the proper focus of the regulations back then, then HEW never would have got into many of the subjects which are now included in the regulations. Let me skip over just to a few remaining points.

First, I think it is important to remember that there are—we thought there were and the court has now confirmed that there are three available remedies under title IX. The first is the implied right of action. There was nothing in the original title IX regulations. We thought it would be inappropriate to provide our advice as to whether or not there was an implied right of action.

The Supreme Court in one of the three title IX cases has stated that, yes, there was. That was our view at the time. It was consistent with the endorsement policy which the Department was taking so that decision did not surprise me. In fact, I agree with it. The second was the reference of cases from the Department to the Justice Department.

This had been common under title VI. We thought it would remain one of the prime enforcement tools of the Government under title IX. In my judgment, just reading the *North Haven* and *Grove City* opinions, the Justices of the Supreme Court appear to have either forgotten or not known that this is in fact one of the remedies available.

They were focusing only on the fund termination, the third remedy. I believe as I read the opinions, what they did was to bring into the coverage section, 901, some of the safeguards which are in the fund termination provision, 902. Of course, the fund termination is the third and last of the three remedies. There was considerable case law under title VI at the time we developed the title XI regulations.

In the final analysis, the test was whether the Federal funds were infected by a discriminatory environment. HEW—when I say HEW, I recognize that HEW is no longer. It is now the Department of Education. But HEW, at that time, the Department of Education now, would have the burden of proof in any fund termination case and discretion in terms of what program funds ought to be terminated.

The title IX regulations reflected the judgment of the Congress, HEW and the President, President Ford. And they represented, I think, a considered approach to a broad range of programs, activities in the education field. Separateness in certain instances was permitted under the regulations.

Clearly, some matters, it is appropriate—dormitories, locker rooms, choirs, which was one of the statutory exemptions which came in after the statute was originally passed. In other cases separateness was permitted. In sports, for instance, we had two areas. If it was a contact sport, or if the sports were based on a competitive basis, separateness was approved. That was not based on a requirement by Congress in the exemption, but it was our judgment that was a reasonable way to deal with the subject of athletics.

On balance, I believed in 1973-75 and I believe now that title IX regulations are sound. If that judgment is shared by members of Congress and the subcommittee, then I do believe the legislative amendment is necessary to put the statute back to where we believed it was in the first instance.

I think H.R. 5490, as I said earlier in my statement, would clarify and by using the language from the regulations, would effectively put us back where we thought we were. It would not broaden the statutory base. I haven't talked to any Members or sponsors, so it is really a question of what their intent is rather than mine.

My analysis is, though, that it would simply support what the Department did at that point in time.

Mr. Chairman, let me conclude my statement with that and I would be delighted to respond to any questions, with the caveat of course.

[Prepared statement of John B. Rhinelander follows:]

PREPARED STATEMENT OF JOHN B. RHINELANDER

Mr. Chairman and Members of the Committees. I am pleased to appear here today, together with Martin Gerry, to provide the Committees, at their requests, with background information on the development of the Title IX regulations by the Department of Health, Education and Welfare (HEW) in 1973–75. I understand the Committees are interested in HEW's then understanding of the scope of Title IX and its approach to the regulations published in June 1975.

In my judgment, H.R. 5490 would amend Title IX to provide the statutory base which we had assumed, after exhaustive analyses of admittedly ambiguous language, that the Congress had originally intended when enacting Title IX in 1972. More specifically, H.R. 5490 would overrule the "program-specific" dictum in Part IV of Justice Blackmun's opinion in *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (May 17, 1982) and the holding in Part III of Justice White's opinion in *Grove City College* v. *Bell*, ——— U.S. ——— (Februrary 28, 1984) limiting the application of Title IX in that case to the college's financial aid program. H.R. 5490 would substitute language drawn in large part from the Title IX regulations themselves.

BACKGROUND

I served as General Counsel of HEW from October 1973 until September 1975. During that time, I participated directly and extensively over a period of twenty months in HEW's extraordinary efforts to develop and promulgate the Title IX regulations. I have not practiced in the Title VI or Title IX fields since leaving government in January 1977. Because I left HEW prior to the development of the Section 504 and age discrimination programs, I will confine my testimony to Title IX with reference to Title VI as appropriate.

I have studied the triology of Title IX cases decided by the Supreme Court: *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) which held that Title IX provided an implied right of action to aggrieved individuals; North Haven which held that employment discrimination comes within Title IX's prohibitions; and Grove City College which held that Title IX coverage is triggered by students' receipts of BEOGs to pay for their education.

Each of these holdings, as I have described them above, is consistent with our understanding of Title IX in 1973–75 when we were developing the Title IX regulations. However, the "program-specific" approach first raised by Justice Blackmun in North Haven which became the basis of Justice White's holding in Part III of Grove City College is narrower than our understanding of the scope to Title IX as originally enacted by Congress. If applied to future interpretations of Title IX, the "program-specific" approach would effectively void much of the scope of the Title IX regulations published by HEW in 1975 and would probably require the Department of Education to revise and curtail the regulations substantially.

Without question, my involvement in the development of the Title IX regulations was one of the most challenging, fascinating, difficult and eventually rewarding exercises in informal rule-making during my years in government. The legislative history of Title IX can generously be described as sparse. The key language of Title IX copied verbatim from Title VI is ambiguous if not arcane. Congress clearly legislated with a very broad brush ("No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity") and delegated to HEW the unenviable task of determining the meaning of discrimination based on sex and determining the meaning of discrmination based on sex and the reach of Title IX ("program or activity receiving federal financial assistance") in the context of legislative language poorly suited to the task. In reading the Supreme Court's trilogy, I sympathize with the Justice who have had difficulty with Title IX. Much of their writings echo differing views within HEW and among the interested public a decade ago.

The two principal offices in HEW which were involved in the Title IX regulations were the Office of Civil Rights (OCR), which had the lead, and my Office of General Counsel (OGC). While OGC's role was initially secondary, it evolved into a co-equal status. I personally reviewed each of the issues identified during the process and, based on staff work by the Civil Rights division of OGC and other attorneys within OGC whom I brought in on an ad hoc basis for a "second opinion", I advised Secretary Weinberger on many of the issues involved.

Title IX was enacted in 1972 when Elliot Richardson was Secretary of HEW and Richard Nixon was President. The regulatory process was completed in the summer of 1975 before Caspar Weinberger resigned as Secretary of HEW and while Gerald Ford was President. When I began as General Counsel in September of 1973, the Secretary was the named defendant in about 8,000 lawsuits. When I left two years later the new Secretary David Mathews was the named defendant in 12,000 lawsuits. In short, I advised the Secretary that he should expect to be sued, at least once, on every regulation HEW published and occasionally on regulations that had not been written. Nevertheless, my goal as General Counsel was to ensure that the Secretary managed the Deparment, based on legally permissable choices, rather than district court judges.

When I became General Counsel, HEW was subject to the first of a series of orders in the *Adams* lawsuit in which Judge Pratt maintained Department officials under injunctive decrees relating to Title VI. When HEW was slow in publishing the Title IX regulations, the Secretary was named a defendant in the *Weal* lawsuit. While it was evident that the scope of Title IX would eventually end up in the courts, I was determined that we would provide advice to the Secretary so that the Title IX regulations would be based on the firmest possible legal foundation.

The Supreme Court, of course, is the authoritative voice on constitutional law and the deciding arbitor in matters of statutory construction, subject to review and revision by Congress. Our Title IX efforts were premised on our best reading of the law as of that time. The Supreme Court has disagreeed in part. In revisiting the subject, the Congress should be aware of how HEW approached the challenge.

THE PROCESS

The development of the Title IX regulations was extraordinay by any measure. It has been the subject of various case studies at law schools as well as law review articles. In brief, it included:

(1) exhaustive legal analyses by OGC, including the legislative history of Title IX; the language, legislative history, regulations and case law under Title VI; and case law invlving race and sex discrimination under the Federal and State constitutions;

(2) identification of issues by OCR in preparation of option papers for the Secretary of HEW, taking into account the differing, frequently clashing, views of individuals and interest groups in the private sector and Members of Congress, with legal analyses by OGC of each alternative under each option;

(3) publication of proposed regulations under Title IX on June 24, 1974 for comment, with extensive discussions in the preamble of HEW's analysis and rationale;

(4) "town meetings" around the country conducted by OCR to discuss the proposed regulations; systematic review of about 10,000 written comments; preparation of additional option papers with legal analyses; and presentation of "final" regulations for approval by the Secretary in May 1975;

(5) extensive discussions with White House staff and three meetings between HEW officials and President Ford; further changes in the "final" regulations to take into account discussions with the White House and advice from the Department of Justice; signing of the regulations by Secretary Weinberger and approval by President Ford; and publication on June 4, 1975; and

(6) transmittal of the regulations to the House and Senate for review pursuant to the legislative veto provision applicable to all education regulations issued by the HEW, following which the regulations as published became effective without change.

THE SCOPE

I would like to stress several points that you should consider in reviewing H.R. 5490 as it applies to Title IX.

First: Congress in enacting Title IX acted with the broadest of legislative brushes. It used Title VI as the legislative model for Title IX. Neither Title IX's sponsors nor Members generally were aware of the logical consequences and legal dictates which became evident only as HEW began to flesh out a multitude of issues which necessarily had to be considered under the mandate of nondiscrimination.

Second: Unlike the Title VI regulations which wre based on hundreds of constitutional cases, the case law on sex discrimination was relatively scant and evolving as HEW worked on the regulations. The Supreme Court was uncertain whether to handle sex discrimination as a "suspect" classification under the Fourteenth Amendment or under a lesser standard applied ad hoc to each case. While some of the issues included in the Title IX regulations, such as athletics, had been the subject of lawsuits in lower courts, the results and remedies differed and many of the issues had still not reached the courts

Third: The Secretary decided, supported by OCR and OGC, that HEW should issue detailed regulations to provide specific guidance to education institutions, individuals, and HEW's regional offices. Further, HEW acted on the basic premise that Title IX was intended by Congress to be broadly remedial, and that the scope of the Title IX regulations should be no less inclusive than the scope of Title VI and the case law dealing with racial discrimination under the Constitution and Title VI.

Fourth: Title IX, as originally enacted by Congress, included only five exemptions. It became obvious as issues were developed by HEW that the logical and legally required scope of Title IX reached activities never intended by the Congress, such as the education programs of the Girl Scouts and Boy Scouts funded by HEW. Based on my advice, the Secretary took the position that further exemptions to Title IX as appropriate should be legislated by Act of Congress. As a result, Congress exempted various institutions such as the Boy Scouts, the Girl Scouts, social fraternities and societies, and choirs. In the process Congress also reaffirmed and directed that revenue producing athletics were subject to the Title IX regulations.

Fifth: The issues reviewed and included in the Title IX regulations were highly controversial and included subjects such as sex education classes, physical education, housing, medical benefits, foreign scholarship programs (such as the Rhodes), athletics and athletic scholarships, and employment. If my recollection is correct, over one-half of the written comments HEW received focused on athletics and athletic scholarships. One meeting with President Ford, when I was the only official from HEW and the President was joined on his side of the Cabinet table by the football coaches of Michigan, Texas, and Oklahoma, was focused solely on the question of athletics, funding of athletic programs, and athletic scholarships.

Sixth: After considerable analyses, concern for First Amendment questions, and review of the Title VI experience, curriculum was explicitly excluded from the final Title IX regulations notwithstanding urgent pleas by some groups to cover that subject. I felt there was a sound legal basis for the Secretary's decision excluding curriculum notwithstanding the absence of a statutory exemption.

Seventh: The scope of issues under Title IX was based on the conclusion, after detailed legal review, that Section 901 of Title IX (the coverage section) applied to a recipient if an education program benefited directly or indirectly from federal financial assistance. HEW knew at the time as did Congress, that controversial programs such as athletics and athletic scholarships received no direct federal funds, and were supported either directly by institutional funds or oftentimes by private funding. If a "program-specific rather than "institution wide" approach should have been the proper focus of the Title IX regulations, HEW would never have included the many matters that it did. If, however, HEW had not covered athletics, then HEW would in my judgment have been found by a court as unlawfully excluding a subject already protected by a Constitutional mantle against sex discrimination at public education institutions.

THE STRUCTURE OF THE TITLE IX STATUTE

Title IX has three sections, two of which are fundamentally important for purposes of the Committees and their considerations of H.R. 5490. They are section 901 (20 U.S.C. 1681) and Section 902 (20 U.S.C. 1682).

Section 901 states the broad nondiscrimination dictate, subject to the five original and now additional statutory exemptions, to be implemented by regulations pursuant to Section 902. In addition to the authority to issue regulations subject to presidential approval, Section 902 contains the "pinpoint" provision relating to fund termination and provides for enforcement by "any other means authorized by law."

JURISDICTIONAL REACH OF SECTION 901

In issuing the proposed and final Title IX regulations, HEW based its approach on the legal conclusion that recipients receiving federal financial assistance were covered on an institution-wide basis. In other words, Section 901 prohibited discrimination in programs and activities which themselves, did not receive any direct federal support. The legal test, in our view, was whether a program or activity in an administratively separate unit benefited directly or indirectly from federal financial assistance. Our legal judgment was that the necessary funding nexus could be established for purposes of the jurisdiction of the regulations by student assistence programs, such as BEOG. In addition, federal funding under various programs freed up institutional funds for other purposes. But for this fundamental legal conclusion, the Title IX regulations would not have covered athletics, athletic scholarships and foreign scholarships programs among other issues. I personally advised Secretary Weinberger and President Ford that this result was mandated by Congress which had intentionally patterned Title IX on the broad reach of Title VI.

Accordingly, to the extent Part VI of Justice Blackmun's opinion in *North Haven* suggests, or Justice White's opinion in Part III of *Grove City College* requires, a narrower reading of Section 901, these opinions are fundamentally different from my understanding of the original Congressional intent and the advice I rendered in 1973-75.

We believed, and I advised, that regulations implementing Section 901 need not be program-specific and that initiation of a fund termination proceeding by HEW, or the reference of a case from HEW to Justice for court enforcement including injunctive relief, was not limited under Title IX to programs or activities which receive direct federal financial assistance. We advised that various activities, starting with decisions of an admission office, but including course offerings and extracurricular activities, could be covered if the educational institution was a recipient of any federal funds.

We believed this was the essence of the remedial approach required by Title VI and Title IX. In the case of Title VI, the case law made clear that discrimination based on race in althletic programs at public institutions was unconstitutional. HEW interpreted Title VI as clearly including, but not limited to, unconstitutional conduct which could be enjoined by a federal court. Similarly, based on our own analysis and a single Court of Appeals decision athletic programs at institutions which discriminated on the basis of sex should be proscribed by Title IX, although the appropriate approach—single team, separate teams, etc.—was a subject of differing views. Accordingly, we advised that the Title IX regulations, implementing the rule-making authority under Section 902, must require equal opportunity in athletic programs of any educational institution which was a recipient of any federal financial assistance. The 1974 Javits amendment, in our judgment, confirmed the approach HEW was taking in the proposed regulations and which it would reaffirm in the final regulations. The dicta in North Haven and the holding in Part III of Grove City College implicitly reject this reasoning.

REMEDY TO SECTION 902

We believed there were three remedies available under Title IX.

The first was an implied right of action by aggrieved individuals. While we decided it was inappropriate for HEW to offer its views on an implied right of action in the Title IX regulations, the holding in Cannon is consistent with our analyses in 1973-75. Because of the limited resources of OCR and OGC, the long delays in either fund termination proceedings or enforcement actions by Justice, the likelihood that the rights of a complainant would probably not be met by any HEW or Justice remedy, and the political sensitivity or certain types of cases and remedies under Title IX, we assumed that a primary enforcement tool of Title IX, as had been the case under Title VI, would be private litigation against particular institutions.

Consistent with this view, HEW published proposed consolidated procedural regulations covering Title VI, Title IX and other civil rights responsibilities at the same time as the final Title IX regulations in order to emphasize that HEW's resources would be focused on "systemic discrimination" rather than individual complaints. This approach, in part a response to a supplemental order in the *Adams* case, was designed to remove HEW explicitly from the duty to investigate "promptly" individual complaints. House and Senate majorities quickly disagreed with the proposed consolidated regulations, but did not suggest in any way that remedies under Title IX should not include private rights of action.

The second remedy under Title IX was an enforcement action referred to Justice by HEW. This had been common under Title VI. We assumed in 1973-75 it would continue to be one of the primary mechanisms, particularly in major test cases under Title IX. The opinions in *North Haven* and *Grove City College* appear to have overlooked completely this enforcement route which, in the case of a public institution, might join counts under Title IX and the Constitution.

The third remedy was for HEW to proceed to terminate funds. An initial decision would be by an administrative law judge followed by a judgment of Hew's reviewing authority, with judicial review pursuant to Section 903 in a federal Court of Appeals, This remedy was actively used under Title VI in the 60's and early 70's. It led to the dictum in the *Taylor County* case and the test whether federal funds are "infected by a discriminatory environment". HEW, of course, has the burden of proof in any fund termination case and some discretion. It was this procedure which was used in the *Grove City College* case when the college refused to sign the institution-wide assurance of compliance required by HEW. In 1973-75, HEW believed failure to sign such an assurance was grounds for terminating all federal financial assistance.

This fund termination remedy can be effective at times, but it can also be Draconian and harm the most those intended to benefit from federal financial assistance. While Congress and the case law have constructed various safeguards for fund termination proceedings, it appears to me that the Supreme Court has read the safeguards to fund termination as an overall limitation on the scope, or jurisdiction, of Section 901.

CONCLUSION

During the 1973-75 period, the Supreme Court was ambivalent in its handling of sex discrimination cases, suggesting but never reaching the conclusion that sex, as race, should be judged constitutionally as a "suspect" category. Commentators suggested that the Court was awaiting ratification of the Equal Rights Amendment which, of course, has not occurred.

I was ambivalent in 1973-75, and remain so today, whether a federal ERA would be wise. Our experience at HEW in 1973-75 demonstrated to me the wisdom of attempting, but the difficulty of determining, when separate should be viewed as equal as between the sexes, a judgment prohibited except in furtherance of a compelling state interest in dealing with racial discrimination.

The Title IX regulations, reflecting as they do the judgment of Congress, HEW, and the President, represent a considered approach to a broad range of programs and activities in educational settings. Separateness in certain instances—whether dormitories, locker rooms or choirs—is clearly appropriate as matters of institutional and individual choices. Separateness in other cases, such as contact or competitive sports, appeared preferable to HEW in 1973-75 although Congress has not explicitly required this result.

On balance, I believed in 1973-75 and continue to believe today, that the Title IX regulations are basically sound. If that judgment is shared by Members of Congress, then a legislative amendment is necessary. H.R. 5490 amends the statutory language to use terms such as "recipient" and an overall approach which is based upon the actual language in the Title IX regulations. Accordingly, H.R. 5490 would clarify and make specific HEW's original interpretation of Title IX which the Supreme Court has rejected.

In closing, let me add three caveats and a final conclusion. First, the Title IX regulations may be broader, but should not be narrower, than the Federal Constitution applied to public institutions. If some of the current or future statutory exemptions or regulatory distinctions foresaking coverage or allowing separateness are eventually struck down under the Federal Constitution, then the scope of Title IX will have to be expanded. The converse, however, is not necessarily true although Congress retains the power, by Statute, to exclude from the regulatory reach activities not prohibited by the Constitution.

Second, as held in Adams, which I believe is sound in principle but intrusive and counter-productive in practice, HEW had (and the Department of Education now has) a duty to enforce Title VI and by analogy Title IX. If it fails to do so, it may again fall under the unjunctive power of a district court and cede its Departmental responsibilities to private litigants. I strongly favor persuasion as a primary enforcement tool, particularly in the field of education, but believe the fund-termination and the unjunctive remedies are tools which must be used in certain cases to assure nondiscrimination. To this end, rule-making is a preferable means of formulating broad legal norms in the first instance rather than individual cases. As a first preference, though, I would urge Congress to speak more clearly and provide a better guidance to the Executive and Judicial branches.

Finally, Title IX provides a federal minimum statutory standard for nondiscrimination. It does not shield institutions in States where stricter "equality" is mandated by State Constitutions than required by the Federal Constitution or Title IX.

In conclusion, the Title IX regulations are a case study of developing nondiscriminatory norms. They should be carefully studied. In my judgment, the basic premise of HEW's efforts in 1973-75 and its decisions should be revalidated by Congress. Therefore, I favor enactment of H.R. 5490 as it applies to Title IX and Title VI. I express no opinion on the other two statutes covered by H.R. 5490.

Mr. EDWARDS. That was a very helpful statement. I recognize the gentleman from Arizona, Mr. McCain.

Mr. MCCAIN. Thank you, Mr. Chairman. Mr. Gerry, you have, according to my information, been very much involved in Baby Doe.

Mr. **Gerry**. I represent seven parents and rights organizations in three cases that involve the Baby Doe issue, that's correct.

Mr. **McCain**. Do you feel there is applicability of the Baby Doe situation to this legislation?

Mr. **Gerry**. Well, I think that at one point in time and I think on a fairly persistent basis, the Department of Justice raised within the administration the argument that they could not carry out the President's directive to enforce section 504 in the Baby Doe situation because of, and this was an argument that they made, the fact that, first, medicaid might not be Federal financial assistance for purposes of jurisdictional coverage of hospitals and doctors.

Then second even if it were Federal financial assistance, *Grove City,* I believe, settled that issue, that if the baby involved in the case were moved from a particular part of the hospital, a ward or a unit, that itself was not specifically getting Federal financial assistance, that they would then not have jurisdiction together in and intervene, the program or activity side of the issue.

I know the Assistant Attorney General for the Civil Rights Division did make those arguments. To answer your question, the legislation, as I read it, would answer both questions definitively. So it would have an effect on that argument, certainly.

Mr. **McCain**. Well, if that interpretation was used by the Attorney General's Office, that would be the most narrow interpretion of Federal aid, it appears to me, since many hospitals obtain very sizable Federal grants in many areas.

Mr. **Gerry**. You are absolutely correct, Mr. McCain. I think many of us were frankly quite disturbed when the President issued a very clearcut directive affirming section 540 and directing the Attorney General to enforce it. Many of us were very concerned with the Justice Department, that it appeared to be attempting to avoid following the President's directive on this extraordinarily narrow basis.

I think that avoidance was ultimately overcome by a decision higher up in the administration, but it was and it probably is an ongoing problem that could be solved definitively by the legislation.

Mr. **McCain**. Do you feel there needs to be amendments to the legislation to insure this would cover these particular cases.

Mr. **Gerry**. No, I don't. I think as it is drafted, the effect on section 540 would be to solve all of the problems that I know about and that have been raised by the Justice Department and others, American Medical Association and others. I think just as the bill is currently drafted, it would solve the problems. I think my clients in the context of the Baby Doe litigation would be satisfied, and feel that we wouldn't have to deal with those kinds of legal—I think any additional amendments might actually confuse things.

I think the way the langauge is drafted right now, it would solve the problem.

Mr. **McCain**. I would first of all like to extend my appreciation for your addressing this terribly traumatic issue for America. I think it is a very difficult problem we are facing. I would like to ask you a personal opinion as to why you think that many of the advocacy groups have not addressed this issue more vigorously.

Mr. GERRY. Well, that is a very good question. It is one that Nat Hentoff has been writing about at some length and one he and I are both interested in.

First, let me say that the disability rights advocacy groups have addressed the issue and I think have provided a substantial amount of support and have joined with us.

Why the broader based civil rights groups have not been more active, I think it is difficult to say. I think first, the issue can get confused with other issues, particularly the abortion issue. And I think that it is a different issue. It is a distinct issue that deals with living babies in nurseries and what I perceive to be eugenics an genocide.

But that relationship has probably caused a certain amount of sensitivity, reluctance and care that might not otherwise be there. I personally think that groups that have now been focusing in on the issue, parents organizations, actually are the best groups to be in the forefront. I represent, for example, the National Association of Retarded Citizens. These are parents of Baby Does.

This is an organization very familiar with the problems. In a way I think it has been very effective for the parents themselves to be taking a leadership position in disputing the American Medical Association and others that have been arguing that somehow, parents are part of this problem.

So it has been a source of some confusion with some of us, but I think there has been an increased awareness in other civil rights and advocacy organizations. I feel a growing sense of that, but one thing that I think would be helpful is for the congressional perception, the public perception of the issue to be as clear as possible, because it does have a tendency to slide into other issues that people are more concerned about.

But I see it as a basic civil rights issue. Nothing could be more central to me than the proposition that if you devalue the life of a child because that child is handicapped, you have rendered meaningless the nondiscrimination laws that demand equal opportunity for handicapped people.

Mr. MCCAIN. Thank you.

Also, it appears that these decisions are being made on the most discriminatory basis, that is whether the parents can afford to pay for the expenses. Do you agree with that?

Mr. GERRY. I think it may even be worse than that, Mr. McCain. I am familiar and I have been very involved with the issue that evolved at the Oklahoma Health Sciences Center, involving spina bifida children, in which—this was in the Journal of the American Academy of Pediatrics—in which groups of doctors and other allied workers without the parents being involved applied a formula which they called "quality of life formula" to decide which infants should be treated and which should not be.

The formula was quality of life equals natural endowment times home resources and family and societal contribution.

Now, natural endowment of spina bifida children as gauged by the group didn't vary much across the children and societal resources was a constant. So what controlled the formula was the decision as to what the home environment and resources were going to be.

I am convinced that that decision—this is as I said written in the October 1983 edition of Pediatrics magazine—that formulation of what home resources were, I know involved conversations of single parent families, race, socioeconomic status, just about every potential bias that could be introduced into the formula.

So I think that—I think money was only one but an important one. So I think you are right. I think that that approach which is remarkable only because it was published in full, represents a good deal of its decision making which I think is insidious and represents the genetics of the worst kind.

Mr. McCain. Again let me express my appreciation for your involvement in this issue. I think it is financially not very rewarding for you and I accept certainly that you do get great personal satisfaction from your work in this area.

Mr. Gerry. Personally, yes, and if I were going to be a civil rights lawyer and I didn't work on this case I don't think I could claim to be interested in the equal opportunities and rights of people in this country.

I think it is a central case and the issues involved couldn't be more fundamental. I appreciate your comments.

Mr. McCain. Thank you.

Thank you, Mr. Chairman.

Mr. Edwards. Thank you, Mr. McCain.

The gentleman from Texas, Mr. Bartlett.

Mr. Bartlett. Thank you, Mr. Chairman.

Before I question the witnesses themselves, I have just received and I am a little late at it—a letter from Clarence Pendleton, Chairman of the U.S. Commission on Civil Rights. I realize it is something that the Joint Committee dealt with last week but I was just inquiring if it would be appropriate, if not already, I understand Mr. Pendleton was not able to appear before the joint subcommittee last week. I wonder if it would be appropriate to inquire as to whether his testimony in full could be entered into the record, either at this point or some subsequent point.

Mr. Edwards. Without objection, it will be made a part of the record on May 16.

Are you advising the committee or is Mr. Pendleton advising the committee that he cannot testify?

Mr. Bartlett. No; I have no communication other than his letter of May 17. I think for clarification it might be helpful to have that letter entered into the record, also.

I assumed that this letter was sent to all members of the joint subcommittee, this particular one being addressed to me.

He addresses that he would—he had designated the Commission staff director, Linda Chavez to appear and present the Commission's views. Other than what is in this letter, I have no further knowledge other than I think his testimony is quite good in support of H.R. 5490 and I think both his testimony and his letter should be entered into the record and the subcommittee should extend an invitation, further invitation to the Chairman to appear.

Mr. Edwards. Well, we certainly do. He is the most important position in the civil rights community, the Chairman of the U.S. Commission on Civil Rights, and for the Chairman not to testify on this very important piece of legislation I am sure is disturbing to all of us and I want to reiterate that we are very anxious to have the Chairman testify.

However we will accept and put into the record the letter and the statement. Thank you.

[Letter referred to above follows:]

U.S. Commission on Civil Rights,
Washington, DC, May 17, 1984.

Hon. Steve Bartlett,
House of Representatives,
Washington, DC.

Dear Representative Bartlett: I was asked to appear before the Joint Hearing of the House Education and Labor and Judiciary Committees on May 16, 1984, to present testimony on proposed legislation to reverse the Supreme Court's decision in the *Grove City* case. I was subsequently unable to testify at the time indicated.

I designated the Commission's Staff Director, Linda Chavez, to appear and present the Commission's views. On the morning that the hearing was to take place, she was told that she would not be allowed to testify unless she was accompanied by a Commissioner. This demand was unprecedented.

A brief review of the Commission records shows that on more than 29 occasions, dating back to at least 1967, the Staff Director or Deputy Staff Director has appeared to testify before Congress on behalf of the Commission. Those appearances included testimony on some of the major pieces of civil rights legislation of the period: the first Voting Rights Act extension, the Emergency School Aid Act, the Equal Employment Opportunities Enforcement Act among them.

The Commission is an independent agency, and I cannot participate in any effort by these two committees to circumscribe that independence. My statement as requested by the Committee is enclosed.

Sincerely,

Clarence M. Pendleton, Jr.,
Chairman.

Enclosure.

Prepared Statement of Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights

Chairman Perkins, Chairman Rodino, I am delighted to appear before you on behalf of the United States Commission on Civil Rights.

We believe that legislation overturning the narrowing effects of the *Grove City* opinion on Title IX and other civil rights statutes should be passed by this Congress. The previous Commission closely followed the *Grove City* case and expressed support for broad coverage of Title IX, as well as Title VI, Section 504, and the Age Discrimination Act. I am here to reiterate that view on behalf of the current Commission. The Commissioners adopted a general statement on March 28, 1984, concerning this matter which I would like to submit for the record. I would like to focus on some of the points made in the statement.

COMMISSION'S POSITION ON SCOPE OF THESE STATUTES

First, with respect to the regulatory authority of funding agencies and the scope of private lawsuits, the Commission firmly supports broad, recipient-wide coverage under Title IX, Title VI, Section 504, and the Age Discrimination Act. Such coverage is important because federal tax dollars should not support discrimination. While the Supreme Court dealt only with Title IX in *Grove City,* the phrase it interpreted, "program or activity," is a limitation common to Title IV, Section 504, and the Age Discrimination Act. Thus, it is appropriate to provide clarifying language in those three statutes, as well as Title IX.

While I will not dwell on this point, the importance of adopting legislation overturning *Grove City* cannot be overstated. Participants in federally assisted institutions should not be left outside the protection of these landmark statutes.

COMMISSION POSITION ON AGENCY REMEDIAL POWER

Second, the Commission believes that the scope of an agency's remedial power should be retained as currently set forth in Section 602 of Title VI and Section 902 of Title IX. Presently, if voluntary compliance efforts fail, a federal funding agency has two principal tools for [illegible] compliance with these four statutes. Under one approach, an agency may terminate its federal financial assistance to a noncomplying recipient. The law currently states that such a fund termination must "be limited to the particular entity, or part thereof, or other recipient as to whom [a finding of noncompliance] has been made and, shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been so found." This is the so-called "pinpoint" termination provision and the Commission supports its retention. Fund termination is a drastic remedy, which denies federal aid to participants at a federally funded recipient as well as to the offending recipient itself. Fund termination should continue to be carefully limited.

The other remedial tool by which an agency enforces these civil rights statutes is, in the language of section 602 and 902, through "other means authorized by law." Such means now include the agency's referral of a matter to the Department of Justice for judicial action. Federal funding agencies are able to use such "other means," including Department of Justice litigation, throughout the entire recipient. Under the pre-Grove City approach, if a recipient received federal aid only for one of its activities, the funding agency could have sought to eliminate prohibited discrimination in other parts of that recipient by referring the matter to the Department of Justice. The agency, however, could only seek to terminate its federal aid to the recipient if the discrimination occurred in the particular activity funded by the Federal government. The Commission supports this pre-Grove City enforcement scheme.

GENERAL COMMENTS ON H.R. 5490

In turning to H.R. 5490, I must make clear that the Commission has not reviewed the specific language in this bill. Consequently, the Commission has not determined whether it achieves the objectives outlined in our March 28, 1984, statement. Our staff has looked at the bill and has some preliminary thoughts and questions concerning it. I want to share with you some of the general points staff believes the Committees should consider in marking up H.R. 5490, and then I want to raise some specific issues that need to be considered.

H.R. 5490 would amend not only Title IX but also three other cross-cutting civil rights statutes. The Commission supports this general approach. We think it is crucial to bear in mind, however, that Title IX's coverage, even in broad form, applies only to educational entities or settings. Title VI, Section 504 and the Age Discrimination Act cover all federally-assisted entities and programs. The Congress, in amending these four statutes, should consider how the language of the amended statutes would operate where funding programs, types of recipients, and their service and benefit delivery may be quite different from those in the traditional education setting. While the *Grove City* opinion involved a college recipient and student financial aid programs, there are hundreds of widely different funding programs administered by nearly 30 major federal agencies, many different kinds of recipients, and many different services and benefits dispensed.

We stress this because we believe the Congress should take special case to be as clear as possible as to how the amended statutes would confer regulatory jurisdiction and provide the basis of private suits in a variety of circumstances, and how the fund termination power should be construed. A lack of such clarity in the current laws as to the meaning of the phrase "program or activity" has created the problem of narrow coverage that now must be corrected. Because these statutes encourage voluntary compliance, clarity in the scope of recipients' obligations is especially important. Not only recipients but participants in federally aided activities have an overriding interest in as clear a bill as you can produce. Moreover, there are numerous enforcement officials and Federal judges who need to be certain of the meaning of the laws they must enforce.

AMBIGUITIES IN H.R. 5490

Our staff has tried to apply the statutes, as they would be amended by H.R. 5490, to a number of circumstances to determine how they would operate. In doing so, it appears that the bill might create some ambiguities in the scope of such amended statutes. We believe some language in the bill needs clarification, perhaps in the legislative history, so that congressional intent as to the scope of these statutes is clear. I would now like to discuss two general areas, coverage and fund termination.

HOW BROAD IS THE DEFINITION OF "RECIPIENT" AND WHAT IS THE EXTENT OF A RECIPIENT'S COMPLIANCE OBLIGATIONS?

The bill's definition of "recipient" includes states, instrumentalities of states and public agencies, including subunits of states. It is not entirely clear what entity would be the recipient in various circumstances. For example, if a state receives a categorical health grant for its health department, is the state government itself the recipient, thereby subjecting to the civil rights laws all activities of the state government, including the state prison system and state professional licensing activities? Or, is the recipient that state health department? It if is the former, we are not aware that pre-Grove City coverage had ever been so extended in that fashion. If the entire state is covered under these circumstances, the regulations enforcing these statutes are also applicable to the entire state. These regulations use an "effects" test rather than the "intent" test, which is generally used under the Constitution in determining whether discrimination exists. The same coverage questions arise under block grant programs as well.

There is also a question of the scope of a recipient's compliance obligations. For example, under the broad coverage of Title IX thought to exist prior to Grove City, all educational activities of a college would have been subject to Title IX by virtue of the receipt of student financial aid and similar educational aid. It is not entirely clear, however, that by virtue of receiving educational aid, a college's commercial activities, unrelated to the educational activities of the college but providing revenue to the college, would have been covered by Title IX. Under H.R. 5490, such activities would seem to be covered. Thus, a college's rental property, even if not occupied by students or faculty, would seem to be covered by Title IX under the bill, in addition to the college's faculty housing and student dormitories. Similarly, under the bill, it appears that educational aid to a college would also subject the college's non-educational, commercial activities, such as the renting of commercial or housing space to non-students and non-faculty, to the requirements of Title VI, the Age Discrimination Act and Section 504. In the case of Section 504, for example, the requirement to make facilities accessible would appear to apply not only to dormitories and classroom buildings, but also to these other properties as well.

The bill draws its definition of "recipient" from existing agency regulations. Unlike the regulations, the bill's definition does not include the word "individuals" or "persons." The absence of the word "person" from the definition of recipient could reduce the scope of coverage of the statute. If a person, not incorporated as a business or as another entity, and entirely unconnected with a recipient as defined by the bill, receives federal financial assistance to conduct activities, those activities presumably are not covered by the bill. Because so much federal aid is provided to entities falling within the bill's definition of "recipient," this omission may not have very much practical significance. Congressional intent with respect to such "persons" receiving federal aid, however, should be clear.

"RECIPIENTS" AND "SUBUNITS"

While the bill's definition of recipient is modeled on definitions in existing regulations, it contains an additional clause not found in those definitions. H.R. 5490's definition of recipient includes entities "which receive[s] support from the extension of federal financial assistance to any of its subunits." What "receives support" means is not altogether clear. It could be interpreted as referring only to funds. However, Senator Cranston, commenting on the companion Senate bill, said that "the concept of 'support" is intended to refer to a not immaterial support having monetary value which could include, for example, services" (S4595, April 12, 1984). For example, if a municipality's fire department receives federal funds to build a fire station, clearly the fire department is covered. Does the municipal government "receive support" from the fire department? If the fire department performs routine checks on fire safety equipment is municipal buildings and puts out fires in municipal buildings, are those services to the municipal government sufficient to subject all of the municipal government's activities to the civil rights statutes? If the municipality was able to spend on other activities the funds it would have spent on the fire department, would that support trigger coverage of the municipality's other activities? The answers to these questions may not be terribly signficant where the municipality or other recipient is receiving a wide variety of federal aid which would lead to wide coverage of the municipality in any event. But not all municipalities and other recipients necessarily receive such extensive federal aid and the answers to these questions may be important to them.

FEDERALLY ASSISTED EDUCATIONAL PROGRAMS AT NON-EDUCATION RECIPIENTS—HOW MUCH COVERAGE UNDER TITLE IX?

H.R. 5490 would amend Title IX by forbidding sex discrimination by an "education recipient" of federal aid. The precise scope of this phrase is not clear. The bill would clearly subject all of a college's educational activities to Title IX upon receipt of federal education aid, and the Commission supports such coverage. Suppose, however, that a state prison is conducting a federally-funded vocational education program. Even after Grove City, such a program would be covered under Title IX as it is written today. While we understand that the sponsors or H.R. 5490 wish to preserve Title IX coverage of a prison's federally-funded educational activities, a goal the Commission supports, the language of the bill does not necessarily achieve that result. A prison may not be readily identified as an "education recipient." Conversely, does the receipt of any federal education money at the prison subject all of the prison's activities to Title IX? Other questions arise: does the receipt of non-educational federal aid to a prison subject the prison's educational activities—and other activities—to Title IX? Accordingly, we would urge that the legislative history carefully reflect Congress's intent in these areas.

Our purpose in raising these and other examples is to draw your attention to possible interpretations of the bill. Congressional intention about such coverage questions ought to be clearly indicated in the legislative history so that agencies and courts enforcing the amended statutes, as well as recipients and beneficiaries, understand the obligations of these laws.

WHETHER OTHER STATUTES SHOULD BE AMENDED

H.R. 5490 does not seek to amend any of the many categorical and block grant federal financial assistance statutes prohibiting discrimination on the basis of race, color, national origin, sex, religion or creed or handicap. (I wish to discuss the revenue sharing statute separately.) Unlike the four major cross-cutting civil rights statutes, these statutes not only contain nondiscrimination provisions, often with the "program or activity" limitation, they distribute federal aid. It is likely that courts will treat the "program-specific" language in these statutes as narrowly as the Supreme Court did in *Grove City*. Moreover, there is a doctrine of statutory construction that suggests that a more specific enactment controls the interpretation of coverage even when a more general enactment has also been adopted. There are other doctrines of statutory construction that might lead to the opposite result. Accordingly, unless Congress clarifies the relationship between the four civil rights statutes and the civil rights provisions of these funding statutes, there is a risk that courts and others might defer to the narrower provisions in the funding statutes themselves. If Congress makes clear that the scope of the four cross-cutting statutes, as amended, supersedes the civil rights scope of the individual funding statutes that contain "program or activity" language, any potential inconsistency between them will probably be substantially reduced.

Even if such clarity is achieved, however, H.R. 5490 will not restore protections against sex discrimination and religious discrimination contained in some funding statutes to the broad scope thought to exist prior to Grove City. Title IX only covers education recipients; even at recipients such as prisons, it presumably only covers educational activities. But, a funding statute with a "program-specific" ban on sex discrimination that provides federal aid to a recipient that conducts no educational activities will likely remain subject to the narrow interpretation of Grove City even if H.R. 5490 is adopted. For example, the federal Water Pollution Control Act of 1948, as amended in 1972, prohibits sex discrimination in programs funded under its authority. This prohibition against sex discrimination under the pre-Grove City board approach would have covered the entire recipient. The Supreme Court's narrow interpretation of "program or activity" seriously jeopardizes such recipient-wide coverage under that Act. Amending Title IX won't rescue this and other statutes providing federal aid to non-education recipients when those statutes have program-specific limitations in their anti-sex discrimination clause.

Moreover, H.R. 5490 does nothing to restore recipient-wide coverage of those provisions in funding statutes which prohibit religious discrimination. For example, the Full Employment and Balanced Growth Act of 1978 forbids religious discrimination in programs funded under the Act. The Commission urges you to consider the possibility of providing recipient-wide coverage under these statutes to ensure that the bans on sex discrimination and religious discrimination are as broad as they were prior to Grove City.

H.R. 5490 AND THE REVENUE SHARING PROGRAM

I also wish to draw your attention to the potential impact of H.R. 5490 on the revenue sharing program. That program provides virtually unrestricted federal money to local governments for use as they see fit. The nondiscrimination provision in the revenue sharing statute contains a program-specific ban against discrimination on the basis of race, color, national origin and sex. It also incorporates by reference the Age Discrimination Act and Section 504. Moreover, the provision also contains the following language: the prohibitions against discrimination in this statute "do not apply when the [local] government shows, by clear and convincing evidence, that a payment received under this chapter is not used to pay for any part of the program or activity." This amounts to a "rebuttable presumption"; in other words, it is presumed that the entire locality is covered under the revenue sharing program unless it can demonstrate that revenue sharing funds were not used in particular activities. Accordingly, prior to Grove City, if a locality spent its revenue sharing funds only to build a park and could show that the payment was not used for anything other than a park, only its parks and recreation department would be covered by the civil rights laws.

Under H.R. 5490, would this "rebuttable presumption" be available to a locality? As a practical matter, eliminating the rebuttable presumption under the revenue sharing act may not have a substantially broadening effect on civil rights coverage because local governments undoubtedly receive other forms of federal aid. Nevertheless, if the rebuttable presumption is effectively eliminated it is possible that some local governments would find more of their activities covered by the civil rights provisions than was the case even before Grove City. Indeed, a locality receiving revenue sharing funds without the availability of the rebuttable presumption might find, for example, its licensing activities—for various occupations and the like—subject to the federal civil rights statutes where they had not been so subject before Grove City. Here, again, the significance is that the federal regulations enforcing these statutes apply an "effects" test, rather than the "intent" test generally used under the Constitution in determining whether discrimination is occurring.

SCOPE OF FUND TERMINATION POWER

I also want to mention briefly some concerns about the fund termination provisions in H.R. 5490. The bill would change part of the pinpoint termination provisions by limiting the "effect [of the termination] to the particular assistance which supports [the] noncompliance. . . ." Here, again, the meaning of "supports" is crucial. Unless clarified, this language could be interpreted to either broaden or reduce the scope of an agency's fund termination power. Neither result is favored by the Commission.

Once the principle is established that federal aid to one part of the recipient subjects the entire recipient to coverage, the statutes' fund termination clauses, as amended by the bill, could be read to mean that all aid at a recipient "supports" any noncompliance at the recipient. This is particularly true if one views the receipt of federal aid as "freeing up"—or "releasing"—the recipient's own funds to be used elsewhere by the recipient. If the enforcers of the statute take this approach, the termination power could be broadened. On the other hand, if "supports" is defined narrowly, an agency might be required to terminate some, but not all, of the federal aid to the part of the institution which was found to be noncompliance. Let me give an example to show both possibilities. Suppose a school district receives federal aid for its elementary and secondary school programs. Suppose, further, that it receives federal funds for a separate evening program of adult education. If the agency finds that there is a Title VI violation in the adult program because it attempts to recruit only white participants, is *all* federal aid to the school district to be cut off? Instead, could only federal funds to the adult education program be terminated? Or, could the agency cut off only that portion of the federal aid used to "support" the discriminatory recruiting effort? The first option, we believe, is probably broader than pre-Grove City enforcement policies, and the third option is probably narrower than those earlier enforcement policies. Clarity as to the extent of the termination power is important in the overall enforcement scheme.

In conclusion, let me urge you, on behalf of the Commission, to restore the scope of these civil rights laws to their broad, pre-Grove City scope. At the same time, care should be taken to clarify how any bill, including H.R. 5490, should be enforced.

To reiterate, we believe that the scope of such terms as "education recipient," "recipient", entity "which receives support from the extension of federal financial assistance to any of its subunits, " and the termination power must be clarified.

Thank you.

Mr. **Bartlett**. Thank you, Mr. Chairman.

I appreciate the testimony of the witnesses and of course your long involvement in each of these pieces of legislation, and in particular Mr. Gerry's involvement in the Infant Doe cases.

As you know Congress passed legislation earlier this year which I think has proved to be quite helpful in this case. So like my colleague from Arizona, I would commend you for your involvement.

You, too, have heard my questions regarding the termination of funds or remedies. I would just have the same question, whether you concur that H.R. 5490 does and should provide for institution-wide coverage but again in laymen's terms, but program-specific enforcement.

Is that your understanding of it? Do you believe that by passing H.R. 5490 we would nevertheless limit the remedy for fund termination to that program which is outside of compliance or would we expand something beyond that?

Mr. GERRY. Mr. Bartlett, I think the answer to your question—I agree with the first point you made which is as I read H.R. 5490 you would clearly have a different basis for the initial jurisdictional reach and fund termination. So I agree with that.

So I think—I think whether the way in which you go about picking the funds or determining which funds should be terminated might be closer to what Mr. Rhinelander as I read the legislation, talked about as far as the so-called infection theory, that is the funds that would be terminated would be those funds which are in one way or another supporting the unlawful discrimination.

So I think that the reason I am hesitating is that the word "program" is a word that is susceptible to so many different meanings. Sometimes it is an organizational division. Sometimes it is a financial aid category.

So I am trying to in answering your question, I think to say—descriptively any Federal funds that would support directly or indirectly the unlawful practice would be those funds which could be terminated. That is—not all funds but the funds that were directly or indirectly supporting the unlawful practice.

Mr. BARTLETT. Let me stop you at that point and ask Mr. Rhinelander to respond after that, do you believe the bill would be helped or not by specifically stating—that is a very good description by the way, that is that to be able to terminate all those funds which contribute to the unlawful practice—do you think the bill would be helped by being more specific with respect to congressional intent for the statute or do you believe the bill says that now?

Mr. GERRY. Mr. Bartlett, I think every administration up to this one has actually interpreted the statutes that way consistently. I think that since the legislative record here seems to be clear that what Congress is intending is to put back in place what has already been in place, that I think the present language would do that and I think that the problem with clarification—this is just my experience in both from drafting legislation as well as trying to interpret it—is that I am not sure you can get much clearer than the way the bill is worded without getting into other anticipated problems.

I would rather stick with—I think there has been a rationale way of doing this up to the present.

Mr. BARTLETT. To further pursue that, sometimes committees find ingenious ways if they cannot figure a way to write it in the statute, we write it in what is called the committee report. Would you think some sort of language with regard to, that it is our intent to reinstate prior to *Grove City,* that that is the congressional intent and not do more or less, do you think that would be something that would be in order?

Mr. RHINELANDER. I think it would be. As I said I have not talked to any sponsors or staff about the intent of the sponsors of the legislation. My reading of the bill and of the Supreme Court cases was—led me to the conclusion that that was the intent, to put the law back where many people had assumed it was before the Supreme Court spoke in the *Grove City* case. I think that would be very helpful, too, if that were stated explicitly rather than move to additional statutory language where it gets very difficult to draft.

Mr. BARTLETT. I think the gentleman is correct. As far as I have been able to tell in talking with sponsors, that is the intent. It is my concern that sometimes congressional intent changes sometimes retroactively and I think it would be helpful to nail down that the language in here reflects the intent that all of the sponsors and the witnesses discussed today in this set of hearings.

Mr. RHINELANDER. Let me just comment. I think it is always helpful to have clear congressional intent expressed before the legislation is passed. Title IX was really quite an extraordinary piece of legislation because after it was passed in 1972 we had statements coming into the record after the fact as to what intent was and the courts have generally said that is not persuasive and when some of the questions came up in the Girl Scouts and Boy Scouts we took the position I think properly that Congress should in fact enact additional pieces of legislation, congressional intent after the fact to exclude something is not persuasive and it will not persuade the courts by and large.

So it is helpful to have a clear statement as the legislation moves through the congressional process as to what the overall intent was.

Mr. GERRY. I would simply agree. I, it is my understanding that that is the intent and I don't see anything—I think it seems completely appropriate to put that in the legislative history.

I think that that is much preferable to trying to do anything with the language because I think that up until Mr. Reynolds and the Supreme Court recent decision there was a consistent and rationale understanding of what that phrase meant and by putting that in the legislative history you would restore that, because I think it worked well.

Mr. BARTLETT. Perhaps in the committee, the joint subcommittees can come up with appropriate language like that and we might use your help.

Let me ask you another question on a different subject than the coverage. Is it your understanding that a finding of intent to discriminate is required under H.R. 5490 prior to fund termination, or is it just simply the result that would have to be found?

Mr. RHINELANDER. I don't believe—I had not thought of that question explicitly before. The failure to find the assurance which was the issue before the Supreme Court in the *Grove City* case, I don't know what the motivation or intent of the college was in that particular case. But it was our understanding back in 1973-75 that the failure to file or sign that kind of assurance in and of itself was sufficient for the Department to move to terminate funds, regardless of what the intent of the school was.

Mr. **Bartlett**. I am not sure I understand what you mean by failure to sign the assurance.

Mr. **Rhinelander**. There is a lot of case law and some statutes specifically deal with intent as opposed to the effect. In this case, I think, whatever the intent of the school was in terms of not signing the assurance, the failure to sign it it seems to me is sufficient for enforcement purposes here.

Mr. **Bartlett**. Could you clarify or elaborate on what you mean by failure to file the assurance?

Mr. **Rhinelander**. Under title IX there is a requirement that the recipient file an assurance that it will not discriminate consistent with title VI. I think they probably have it in title VI, IX, 504, et cetera. That is a requirement prior to eligibility for Federal funding.

Mr. **Bartlett**. So under that even though the institution was not in any way found to be in a discriminatory practice, failure to file that form was grounds to move against them?

Mr. **Rhinelander**. The actual practice of the school we don't have to go to if they in fact failed to file that kind of paper.

Mr. **Gerry**. There is a similar provision in the General Education Provisions Act in which Congress has imposed as a precondition to the receipt of formula grant funds, a promise not to discriminate which is really analogous to this. So it is really a condition, almost contractual condition between the Federal Government and the school.

As far as the intent question, I don't think H.R. 5490 as I read it has any impact at all on the question of a standard for determination of what is unlawful discrimination and what is not. I don't read anything in it that would affect that.

I assume that the most recent case, and that is the *Guardians* case in which the Supreme Court basically established—the Supreme Court recognized the ability of an administrative agency to establish regulations which call for a more or less results test. I think this legislation would leave that untouched.

Mr. **Bartlett**. Two specific questions on title IX. You referred to curriculum, I believe. Would H.R. 5490 in any way expand title IX to curriculum?

Mr. **Rhinelander**. No, it would go back, I think it would simply provide the statutory base that was there in the first instance.

Mr. **Bartlett**. And that does not include curriculum?

Mr. **Rhinelander**. It was our judgment at the time and we looked at the title VI experience and as I recall it—let me stress this was 10 years ago so my memory is not necessarily as sharp as it could be—in the enforcement of title VI neither the courts nor the review process had moved into the curriculum area, at least to any great extent. It was our bases based on that review it was our judgment that it was clearly legally permissible to exclude coverage of curriculum from title IX. In fact, moving into the curriculum area does begin to get into first amendment questions.

So the judgment at the time was that it was legally permissible to exclude it. There was no nothing that Congress had passed saying you must exclude it. It is conceivable that the Department could open up the rulemaking process and do it again. Things like that have happened in the past and if Congress disagreed in the past in certain areas have made quick their conclusions.

Mr. **Bartlett**. You argue that H.R. 5490 does not reflect Congress' disagreement.

Mr. **Rhinelander**. Not with excluding.

Mr. **Gerry**. When Mr. Rhinelander talks about curriculum, I think what you are talking about is the content of particular materials, because it does reach the availability and access to general curriculum. We are talking about specifics.

Mr. **Bartlett**. One other question: Does H.R. 5490, in your opinion, reach any entities other than educational institutions?

Does it expand title IX to other institutions besides educational institutions?

Mr. **Gerry**. I don't think as I read it—let me get the statute out.

I think it talks about educational activity which is the language from title IX. There are, of course, institutions that conduct educational activities that are not educational institutions. They were already reached under title IX. So it is an educational activity, not the institution.

I think H.R. 5490 leaves things as they are, as I understand. It would include some institutions that are not traditionally called educational institutions.

Mr. **Bartlett**. But no more than we have now.

Mr. **Gerry**. Right.

Mr. **Rhinelander**. I agree. I understand it leaves things where they were and the coverage was broader than educational institutions, really where educational program funds went, some of which went to institutions which were not classic educational institutions.

Mr. **Bartlett**. Thank you for your patience. Thank you to the witnesses.

Mr. **Edwards**. Thank you, Mr. Bartlett.

Mr. Gerry, last week we heard testimony from officials of private colleges who said that because of the *Grove City* decision, a number of colleges may opt to refuse to accept BEOG students.

Is this likely to happen, and if it does, will minority and women students be denied access to these colleges?

Mr. **Gerry**. Mr. Chairman, I guess it has been about 20 years since I probably first heard that, I guess you could call it, prediction/threat.

I grew up around a private college, not a small one, in northern California, and I guess when I first heard it, it was in the context of Bob Jones, the terminated higher education institution which occurred about my time at arriving at HEW. I thought, in fact, that there might be some practical and reliable wisdom in that prediction.

I have come over the years to talk to a lot of private higher education people, and I have found them perturbed and annoyed, as I have so many other people, by Federal regulations and requirements, but I don't believe that there are any significant bodies of higher education administrators in the private school area who are going to talk away the financial opportunities for support to students in order to not comply with some fairly straightforward—although perhaps burdensome—requirements as they perceive them under the Federal civil rights laws.

So I don't think, Mr. Chairman, that there is any more likelihood that that will happen now than there was in 1964 or 1974. And I think that the issue, unfortunately, has been demagogued by a few people who have chosen to build their academic reputations—or maybe not academic, higher education reputations—on setting up what I think are strawmen struggles over signed simple pieces of paper, assurances; whereas, people who in good conscience are concerned about the proper relationship between Government and private higher education have recognized that Congress has made a judgment with respect to that balance and have moved on to provide equal educational opportunity and have gone along with regulations which, in the abstract, they may not have totally agreed with.

I think that is where we are, for the most part.

Mr. EDWARDS. I thank you.

Mr. Rhinelander, would you agree with that?

Mr. RHINELANDER. Yes, I do, Mr. Chairman.

Mr. Chairman, let me add one further point. I come from an academic family and I think all of you all understand the academics generally take exception to Federal intrusion into their institutions. But it is clear Congress has the power to put conditions on Federal funds.

There is an enormous need for funds now among small, private colleges, so I would think it would be just a handful at most that would in fact follow through with any such threat.

I would also point out that to the extent that the schools are tax exempt under the Internal Revenue Code, which presumably they are, there are also now conditions under the IRS regulations in terms of a nondiscriminatory policy.

So I think unless they are also going to give up their tax-exempt status, which would deprive them of the power to get funds from individuals of one kind or another, I think the likelihood of any significant number of schools doing this is really very minimal.

Mr. EDWARDS. Well, my last question, Mr. Gerry, would be, what about a large institution getting considerable Federal funds from one department or another with a lot of disadvantaged students and in one department there is discrimination and all the funds under title IX or whatever are cut off and all these minority students and disadvantaged students are not going to be able to go to college any more?

Mr. GERRY. Well, Mr. Chairman, that has also been something that I have been dealing with; that argument has kind of been around the civil rights program for a long time, since its creation, I think. It has always been a difficult one for all administrators of the office for civil rights to deal with.

Personally, I believe that there is discretion and I think there is discretion under this legislation with respect to fund cutoff sanctions. When I was at HEW, I was involved in, the count now I think is 65 administrative enforcement proceedings, and in each I think there was a careful, thoughtful examination of what funds appropriately should be the subject of the termination proceeding.

I happen to be a strong believer in judicial enforcement of these civil rights laws and, as Mr. Rhinelander mentioned earlier, it is one of the sanctions that is available.

I think in cases where one cannot make a rational judgment about the termination sanction—in other words, where the effect of the termination would be so catastrophic and where the likelihood of—and negotiation is always a realistic part of this—what you start out with and what you expect to have in the long run is somewhat different. Fund cutoff is an important part of negotiation, threat of fund cutoff. I don't want to erode that.

But in cases where you would have a catastrophic effect or where you can't make the judgments, I think there should be judicial enforcement. I think that the equitable relief available by or as a result of suits by the Department of Justice ought to become more and more a way of enforcing particulary systemic discrimination.

I started out as Leon Panetta's executive assistant in 1969 in the office for civil rights and I was sort of the end of the first era of enforcement where the cases were relatively simple and straightforward, but as the cases grew in complexity—and title IX and 504 cases often do—the kind of enforcement we believe we need is corrective, not just punative.

I think I would like to see, frankly, the Department of Justice take a much bigger role in the active enforcement of cases after they have been developed by the agencies. I think the present administration has had a great deal of reluctance to do that.

Some people see it as judicial activism. I would see it as selectivity among the cases when you have cases such as the one you described.

I would hope the Congress may have an opportunity to really look at that issue of judicial enforcement and the extent to which it is used and when it is used.

Mr. Edwards. Thank you.

Do you agree, Mr. Rhinelander?

Mr. Rhinelander. Yes, I do, Mr. Chairman. I think it is terribly important to stress, and, as I pointed out in my oral remarks and my statement goes into it further, there are three remedies under title IX of the Civil Rights Act, two Government remedies. One is fund termination; the other is the reference to the Department of Justice for appropriate legal action.

There is no doubt that fund termination is a Draconian remedy. It can harm, in individual cases, those groups who are intended to be the beneficiaries of particular programs, and in those cases, injunctive relief is clearly more appropriate than fund termination.

But the statute provides for both of those remedies and I think it is a question of enforcement policy rather than anything wrong with the statute. The statute clearly permits the Government to go either way.

I would certainly agree with Mr. Gerry, I think the court enforcement at times is a better remedy and should be used more.

Mr. Edwards. Thank you.

Mr. Bartlett.

Mr. **Bartlett**. If I could obtain just a bit of time to follow up on that question.

One of the complaints we hear about in enforcement activity is often fund termination is threatened, and not effectuated, but threatened without benefit of a court proceeding.

Would you encourage a change in the underlying statutes that would require the court proceeding or is that what is happening now? How is fund termination accomplished? Can it be accomplished without court action?

Mr. **Rhinelander**. Marty is much more expert than I, but the fund termination involves three stages. There is an administrative hearing, so nothing is done without a hearing. I think that is the important point to make first.

There is a review process within the administrative chain, and then finally there is an appellate review in the Federal courts of appeals. But the most important fact is that it be done only after a rather long process.

So in one case, yes, it is a hearing in Federal court at the beginning and in another case, the hearing is an administrative hearing. But in both cases, there is a hearing before the final action is taken whether it is fund termination or a judicial decree by the court.

Mr. **Bartlett**. The hearing is administrative in nature?

Mr. **Rhinelander**. Yes.

Mr. **Gerry**. It is a three—maybe I can give you a specific example.

Take Grove City. If you went through the administrative hearing route, you would have first a hearing in the Department of Education by an administrative law judge appointed by the Secretary, Secretary Bell.

Then there is a review procedure called the reviewing authority, which is a group of individuals appointed by the Secretary as well to review cases. So they would then review the case.

Then it is discretionary as far as an appeal to Secretary Bell. He in turn can review the case.

Then there is a right of appeal to the Court of Appeals for the District of Columbia circuit, and they can review it.

Mr. **Bartlett**. The recipient has to make that appeal?

Mr. **Gerry**. Yes, the losing party has the right to appeal. The Secretary would not make an appeal, I guess wouldn't be a losing party in the decision in which he was the decisionmaker but normally it would be the recipient.

If the Secretary was out of the process, which in some departments is the case, that might happen. So you would have four hearings before you got to fund termination itself.

In the court of appeals review, the entire administrative record would be before the court and it would be subject to the Administrative Procedures Act, which all those hearings are, so you have a fairly exhaustive and time-consuming process for termination.

Mr. **Bartlett**. If after you walk through the process and it is totally an administrative process, but nevertheless an appointee of the Secretary—the executive branch—and the administrative process makes the decision to terminate funds. You are saying then the recipient may appeal to the court of appeals.

Mr. **Gerry**. Federal Court of Appeals for the District of Columbia.

Mr. **Bartlett**. And the funds continue to flow while the procedure is underway.

Mr. **Gerry**. Yes.

Mr. **Bartlett**. If the recipient loses in the final judicial——

Mr. **Gerry**. He has the right of appeal to the Supreme Court from that.

Mr. **Bartlett**. Does he have to pay back money gotten in the meantime?

Mr. **Gerry**. No.

Mr. **Bartlett**. So all the money during the appeals he got he is not required to pay back, he would keep?

Mr. **Gerry**. That is correct. In other words, you don't have—I am distinguishing this because it may be confusing from the audit exception process, which is another whole issue.

But in the civil rights enforcement procedure up to the point of actual termination, in other words, the filing of the final notice with the Congress, which is the last thing you do prior to the termination, all of that money coming in is "lawfully" being received by the recipient because there hasn't been a final determination—"lawfully" in quotes—there is no requirement to pay that money back. Termination is prospective.

Mr. **Edwards**. We welcome the gentleman from Illinois, Mr. Erlenborn.

Do you have any questions?

Mr. **Erlenborn**. No, Mr. Chairman, no questions. After having gotten here after all the testimony, I am not prepared to ask questions.

Mr. **Edwards**. That is the first time you have not been prepared in my recollection.

But we thank the witnesses for a very excellent session.

The subcommittee will recess now until 1 p.m. this afternoon. We have another panel of witnesses.

[Whereupon, at 11:28 a.m., the joint committees recessed, to reconvene at 1 p.m., this same day.]

Mr. **Edwards**. The subcommittees will come to order.

We are meeting on H.R. 5490, the Civil Rights Act of 1984. The hearing is being held jointly by the Committee on Education and Labor and the Committee on the Judiciary, the Subcommittee on Civil and Constitutional Rights.

Our panel for this afternoon will be our friends of many years, the very distinguished executive director of the ACLU in New York, Mr. Ira Glasser, and Mr. Julius L. Chambers, who is president of the Legal Defense and Education Fund in Charlotte, NC.

The two witnesses can proceed to the witness table.

Without objection, both of the full statements will be made a part of the record.

I believe, Mr. Glasser, you will testify first. Mr. Glasser, we welcome you.

STATEMENT OF IRA GLASSER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Mr. **Glasser**. Thank you, Mr. Chairman.

Mr. **Edwards**. You may proceed.

Mr. **Glasser**. Thank you, Mr. Chairman. I am, of course, delighted to have this opportunity to express the American Civil Liberties Union's deep commitment to the enactment of H.R. 5490, the Civil Rights Act of 1984. This legislation is an opportunity for Congress to reinforce and reaffirm the Nation's fidelity to equality of opportunity and treatment, unfettered by discrimination based on race, national origin, sex, handicap or age.

Of course, as you know, H.R. 5490 will restore title IX of the Education Amendments of 1972, and the related laws addressed by the bill—title VI of the 1964 Civil Rights Act, section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975, to the scope and strength which Federal agency officials and numerous Federal courts assumed they had for many years.

The legislation responds effectively and narrowly to the limitations on these laws imposed by the Supreme Court's decision in *Grove City College* v. *Bell* that the prohibition in title IX on sex discrimination in federally assisted education programs applies only to the particular educational "program or activity" receiving the Federal funds.

We want to emphasize that H.R. 5490 is not just an affirmation of the prevailing interpretation before the *Grove City* decision. It is in our view also reflective of the only correct view if these laws are to be as effective as originally intended, and as they have functioned. It is appropriate and necessary for this Congress to make clear that the prohibitions against discrimination with the support of Federal money extend to the recipients of that money without prior proof that a particular portion of the funds went to a particular component of the recipient's activities.

If that were the law and if that is allowed to prevail, the complex factual inquiries that would be required before agencies could investigate complaints or lawsuits and before those lawsuits could be filed would slow enforcement down so completely that we could see a return to the days of undetected and uncorrected discrimination that existed before the passage of these laws.

Today I think we all agree that effective enforcement of the laws is needed more than ever. Federal assistance triggering coverage by these laws involves billions of dollars. There are more than 3,000 postsecondary education institutions receiving Federal funding. The number of medicare provider hospitals exceeds 6,000. There are thousands of non-Federal Government and private agencies which are receiving Federal funds each year. We must ensure that they do not abuse this money by engaging in discrimination.

We do not need here to revisit the debate about why those laws were passed, some of them as long as 20 years ago, or why they are still needed today. The most important task is to look forward and recognize that if this Nation is to prohibit future discriminatory uses of Federal funds, this legislation is essential.

I want to comment on another concern of the ACLU that is involved here. And that is the concern that this legislation might arguably invade the right of private organizations to operate free from Federal Government interference. Some have expressed the concern that title VI and the other statutes derived from this legislation would endanger those rights. We want to address this concern briefly, because it relates directly to the concerns of the ACLU. If we believed that these laws presented a serious threat of improper governmental intrusion into private rights, we would have to question the wisdom of H.R. 5490. However, I want to take this opportunity to state, without hesitation, that the nondiscrimination provisions which will be restored to their intended vitality by H.R. 5490 pose no genuine threat to the appropriate exercise of private rights.

We have reviewed this issue fully in the past as well, as in the light of this legislation, in light of our regard for the rights of private associations and organizations. Our conclusions are reflected in a policy statement which is precisely on point. It says:

> Private associations and organizations, as such, lie beyond the legitimate concern of the State and are constitutionally protected against Government interference. The freedom of association, as well as thought, speech, religion, the press, and petition, guaranteed by the first amendment, insulates individuals in these private activities. Private organizations may carry on some activities that would be unconstitutional if sponsored by the Government or its agencies. Their right to do so is not absolute, however. Under [some] circumstances any purposes, policies, and practices of private organizations which violate constitutional standards should become subject to governmental scrutiny.
>
> Discrimination on the basis of race, sex, religion, or national origin is impermissible and should be prohibited by laws in private organizations—cultural, educational, social service, et cetera—that receive public support of any kind; that perform an official or quasi-official function; or that exclude persons subjected to such discrimination from access to fundamental rights or the opportunity to participate in the political or social life of the community.

This policy statement and similar ones addressing handicap and age discrimintion are at the heart of the ACLU's support for these laws and central to our belief that this corrective legislation must be enacted.

Another concern has to do with the possible overbreadth of funds termination. Because these laws expressly permit funds termination as one enforcement option, we know some people may fear that H.R. 5490 could endanger funding for valuable programs which serve the very groups intended to be protected by our nondiscrimination laws. We have considered this concern, and are fully satisfied that these statutes have not and will not be the means by which such programs and opportunities for women, minorities, the elderly, and disabled persons will be limited. A few statistics about how these statutes have been used in the past illustrate why this concern is not warranted:

No funds have ever been terminated as a result of enforcement actions under title IX or the Age Discrimination Act.

The only funds termination order under section 504 occurred when a Federal district court, on its own initiative, ordered funds to be cut off from a major teaching hospital which had refused to let the Federal Department of Health and Human Services conduct an investigation of a section 504 complaint. That order has not gone into effect because it is under review by a Federal appeals court. The Department itself has never terminated funds because of a section 504 violation.

Under title VI, funds termination has occurred only once since 1972. Before then, it was used 220 times, most of those involving local, unsegregated school districts.

Five higher educational institutions were affected and 18 health and other facilities.

These figures are particularly significant when we recall that over 15,000 local school districts receive Federal funds and are therefore covered by all 4 statutes:

More than 10,000 medical facilities across the country are covered by title VI, section 504 and the Age Discrimination Act, and the educational programs they offer are also covered by title IX;

There are over 3,000 institutions of higher education in this country, including over 1,400 public ones, virtually all of which received Federal funds;

More than two-thirds of the private institutions receive direct Federal funds.

In short, the vast number of covered institutions and the very small number of funds terminations over a 20-year period show that this provision has been seldom used and certainly has never been abused.

To raise the obstacles which would have to be jumped before you can even get in and investigate, which is what the *Grove City* decision does, would in our view effectively forestall the kind of enforcement we need to continue to ensure.

My final concern about congressional deliberations on this legislation has to do with the possibility that this bill will be used as a vehicle for a wide variety of amendments, directed either at the limited purpose of the legislation or other social policy and legal issues which may be germane to it.

The ACLU shares the commitment of the sponsors of this legislation and the dozens of organizations supporting it to oppose all amendments during committee consideration, and on the floors of the House and Senate. While we as an organization resist efforts to restrict the free flow of deliberation and amendments during the legislative process, this is an instance where amendments clearly would destroy the legislation. This is so for two reasons.

First, and most importantly, the supporters of this proposal are bound by one goal—to address the damaging effects of the *Grove City College* decision. The long bipartisan lists of cosponsors in the House and Senate and the wide range of supporting organizations have agreed to put aside other goals in order to achieve the single one this bill addresses. I am sure some groups share our belief that sex discrimination should be prohibited generally, and not just in education. Others, I know, would like to see these statutes clarified to improve enforcement. Some Members of Congress or the Senate may favor amendments on abortion, busing, the intent standard of proof for civil rights violations, or what has been called the "Baby Doe" question dealing with the rights of newborns.

This legislation is doomed if it is used by Congress to address these issues or any others except the effects of the *Grove City* decision. The strength of the coalition which supports H.R. 5490 and S. 2568 is founded on our mutual agreement to stand together in favor of this bill and against all efforts to change it.

Second, the realities of the legislative calendar, as you are acutely aware, dictate speedy action. Our organization, like so many others is prepared to devote massive resources of staff time and community support to the effort, but none of us can halt the legislative clock. I urge you to make every possible effort to move this legislation quickly. Amendments will only consume time and time is the thing we have the least of.

I am fearful of what may happen if this legislative effort fails. Within days of the *Grove City College* decision, several events occurred which made clear that if Congress did not act, the protections for women, minority group members, the disabled and the elderly would dwindle further away. Administration officials indicated they intend to apply the restrictive *Grove City* ruling, though technically limited to title IX, to the other States for enforcement purposes. Certain enforcement actions then pending were dropped on the grounds that they no longer were appropriate under title IX.

Some colleges began to question whether they still would be under the same obligations with respect to nondiscrimination in their athletic programs. And surely, enforcement officials in every region of the country are now confused abut the scope of their authority to investigate allegations of discrimination under each of these laws.

This legislation is urgently needed as a matter of law and policy. It is fully consistent with our national commitment to social justice. I urge these committees and the Congress as a whole to act on it as quickly as possible.

Thank you for the opportunity to share the views of the ACLU on this important matter. I will be glad to answer any questions you may have.

Mr. EDWARDS. Thank you very much, Mr. Glasser.

[Prepared statement of Ira Glasser follows:]

PREPARED STATEMENT OF IRA GLASSER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman, I am delighted to have this opportunity to express the American Civil Liberties Union's deep commitment to the enactment of H.R. 5490, the Civil Rights Act of 1984. This legislation is an opportunity for Congress to reinforce and reaffirm the nation's fidelity to equality of opportunity and treatment, unfettered by discrimination based on race, national origin, sex, handicap or age.

The ACLU is a nonpartisan, nationwide organization of more than 250,000 members. We are dedicated to the advancement of individual rights, particularly those guaranteed in the Bill of Rights of our federal Constitution. We also represent in court those seeking to secure the rights protected by our civil rights statutes. We participate actively in efforts to protect those statutes from regulatory or administrative encroachment, undue judicial limitations and harmful legislative modification. Whenever appropriate we are also vigorous advocates of improvements to those laws. In H.R. 5490 we have an opportunity to engage in each of these roles, for the bill is both a reaction to a regrettable judicial development and an opportunity for Congress to move affirmatively to return essential statutory protections to their intended strength.

H.R. 5490 will restore Title IX of the Education Amendments of 1972, and the related laws addressed by the bill—Title VI of the 1964 Civil Rights Act, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975, to the scope and strength which federal agency officials and numerous federal courts assumed they had for many years. The legislation responds effectively and narrowly to the limitations on these laws imposed by the Supreme Court's decision in *Grove City College* v. *Bell* that the prohibition in Title IX on sex discrimination in federally assisted education programs applies only to the particular educational "program or activity" receiving the federal funds.

We want to emphasize that H.R. 5490 is not just an affirmation of the prevailing interpretation before the *Grove City* decision. It also reflects the only correct view if these laws are to be as effective as originally intended. It is appropriate and necessary for this Congress to make clear that the prohibitions against discrimination with support of federal money extend to the recipients of that money, without prior proof that a particular portion of the funds went to a particular component of the recipient's activities. The complex factual inquiries that would be required before agencies could investigate complaints or lawsuits could be filed would slow enforcement down so completely that we could see a return to the days of undetected and uncorrected discrimination that existed before the passage of these laws: For example,

"Between 1946 and 1962, $36.0 million in federal funds went to racially segregated medical facilities.

"In 1968 HEW gave more than $686,000,000 of financial assistance to 102 medical schools. That same year women made up 11% of total applicants to medical schools and only 9.7% of the total admittees.

"Before the enactment of Section 504, few colleges and universities in the country were accessible to disabled students. This inaccessibilty, combined with prejudicial attitudes, barred participation by disabled persons to many institutions of higher education which received federal funds.

"In 1975 older persons accounted for 15% of the service area population where federally-assisted community mental health centers are located but represented only 4 percent of the centers' participants."

Today, effective enforcement of the laws is needed more than ever. Federal assistance triggering coverage by these laws involves billions of dollars. There are more than 3,000 postsecondary education institutions receiving federal funding. The number of medicare provider hospitals exceeds 6,000. There are thousands of nonfederal government and private agencies which are receiving federal funds each year. We must ensure that they do not abuse this money by engaging in discrimination.

As Congress considers this legislation, it is helpful to look back and assess the value of these laws and how they have worked in the past. But the most important task is to look forward and recognize that if this nation is to prohibit future discriminatory uses of federal funds, this legislation is essential.

THE HISTORICAL NEED FOR LAWS TO PROHIBIT FEDERALLY FUNDED DISCRIMINATION

The laws H.R. 5490 addresses reflect the maturation of this nation's consensus against the federal support of discrimination. That consensus focussed primarily at first on race-based discrimination, but grew to cover sex, handicap and age discrimination as well. Title VI has its foundation in the bitter and shameful history of race segregation which, unfortunately, did not go away after the Supreme Court's decision 30 years ago in the first *Brown* v. *Board of Education* decision. On the contrary, segregation persisted throughout the South in the public schools right up until the time the 1964 Civil Rights Act was passed. Who can doubt that without the passage of the 1964 Act, segregated school systems would have persisted in huge numbers, perhaps until today?

Prior to the passage of Title IX in 1972 it was common practice to deny women admission to professional schools, exclude women and girls from vocational education opportunities and restrict female access to athletic competitions. All of these discriminatory practices were legal and supported by taxpayer money in the form of federal financial assistance to providers of education. Title IX has served as the catalyst in gaining equality of treatment for women and girls in schools and colleges throughout the nation.

The passage of Section 504 of the Rehabilitation Act of 1973 and later amendments clarifying the reach of the law were an important step in our national recognition of the need to address widespread discrimination based on handicap: handicapped children are too often denied the educational recreational, athletic and extracurricular activities provided for nonhandicapped students; architectural barriers in school buildings sometimes prevent appropriate educational placements; prejudices frequently operate to eliminate handicapped job applicants from the hiring process without regard to the applicants' ability to perform the jobs in questions; architectural obstacles often make public transportation systems inaccessible for many disabled persons. These are just a few of the areas of daily life in which discrimination has occurred too often in the past and Section 504 says may not be supported with federal funds.

The Age of Discrimination Act was passed in 1975 and strengthened in 1978 because of the extensive evidence that discrimination on the basis of age is widespread in such areas as mental and physical health care, adult education and vocational rehabilitation. The problem is most acute for persons over the age of 65, but it can affect people of almost any age. For example, a study done in the mid-'70s indicated that one quarter of the medical schools surveyed use age criteria in admissions decisions.

Without the requirement in these laws that recipients of federal assistance either cease discrimination or lose the federal money, that money could continue to support discrimination. This alternative is unacceptable social policy for a pluralistic democracy like ours. Moreover, with respect to discrimination based on race it is also unconstitutional.

ANTI-DISCRIMINATION LAWS AND THE RIGHTS OF PRIVATE ORGANIZATIONS

There are some who are concerned that Title VI and the other statutes derived from it, are a danger to the right of private organizations to operate free from federal government interference. I wish to address this concern briefly because it relates so directly to the concerns of the ACLU. If we believed that these laws presented a serious threat of governmental intrusion into private rights, we would have to question the wisdom of H.R. 5490.

I can and do state without hesitation, that the nondiscrimination provisions which will be restored to their intended vitality by H.R. 5490 pose no genuine threat to the appropriate excercise of private rights. We have reviewed this issue fully in the past in light of our regard for the rights of private association and organizations. Our conclusions are reflected in a policy statement which is precisely on point. It says: "Private associations and organizations, as such, lie beyond the legitimate concern of the state and are constitutionally protected against government interference. The freedom of association, as well as thought, speech, religion, the press, and petition, guaranteed by the First Amendment, insulates individuals in these private activities. Private organizations may carry on some activities that would be unconstitutional if sponsored by the government or its agencies. Their right to do so is not absolute, however. Under [some] circumstances any purposes, policies, and practices of private organizations which violate constitutional standards should become subject to governmental scrutiny.

"Discrimination on the basis of race, sex religion, or national origin is impermissible and should be prohibited by laws in private organizations—cultural, educational, social service, etc.—that receive public support of any kind; that perform an official or guasi-offical function; or that exclude persons subjected to such discrimination from access to fundamental rights or the opportunity to participate in the political or social life of the community."

This policy statement and similar ones addressing handicap and age discrimination are at the heart of the ACLU's support for these laws and central to our belief that this corrective legislation must be enacted.

FUNDS TERMINATION AS A REMEDY FOR DISCRIMINATION

Because these laws expressly permit funds termination as one enforcement option, we know some people may fear that H.R. 5490 could endanger funding for valuable programs which serve the very groups intended to be protected by our nondiscrimination laws. We have considered this concern, and are fully satisfied that these statutes have not and will not be the means by which such programs and opportunities for women, minorities, the elderly and disabled persons will be limited. A few statistics about how these statutes have been used in the part illustrate why this concern is not warranted:

No funds have ever been terminated as a result of enforcement actions under Title IX of the Age Discrimination Act.

The only funds termination order under Section 504 occurred when a federal district court, on its own initiative, ordered funds to be cut off from a major teaching hospital which had refused to let the federal Department of Health and Human Services conduct an investigation of a Section 504 complaint. That order has not gone into effect because it is under review by a federal appeals court. The Department itself has never terminated funds because of a Section 504 violation.

Under Title VI, funds termination has occurred only once since 1972. Before then, it was used 220 times. 197 of those instances involved local school districts—usually because the schools were segregated.

Five higher educational institutions were affected and 18 health and other facilities.

These figures are particularly significant when we recall that over 15,000 local school districts receive federal funds and are therefore covered by all 4 statutes;

"more than 10,000 medical facilities across the country are covered by Title VI, Section 504 and the Age Discrimination Act, and the educational programs they offer are also covered by Title IX.

"There are over 3,000 institutions of higher education in this country, including over 1,400 public ones, virtually all of which received federal funds;

"more than two-thirds of the private institutions receive direct federal funds."

In short, the vast number of covered institutions and the very small number of funds terminations over a 20 year period show that this provision has been seldom used and, certainly has never been abused.

H.R. 5490 MUST BE ENACTED WITHOUT AMENDMENT

My final concern about congressional deliberations on this legislation has to do with the possibility that this bill will be used as a vehicle for a wide variety of amendments, directed either at the limited purpose of the legislation or other social policy and legal issues which may be germane to it.

The ACLU shares the commitment of the sponsors of this legislation and the dozens of organizations supporting it to oppose all amendments during Committee consideration, and on the floors of the House and Senate. While we as an organization resist efforts to restrict the free flow of deliberation and amendments during the legislative process, this is an instance where amendments clearly would destroy the legislation. This is so for two reasons.

First, and most importantly, the supporters of this proposal are bound by one goal—to address the damaging effects of the *Grove City College* decision. The long bipartisan lists of cosponsors in the House and Senate and the wide range of supporting organizations have agreed to put aside other goals in order to achieve the single one this bill addresses. I am sure some groups share our belief that sex discrimination should be prohibited generally, and not just in education. Others, I know, would like to see these statutes clarified to improve enforcement. Some Members of Congress or the Senate may favor amendments on abortion, busing, the intent standard of proof for civil rights violations, or what has been called the "Baby Doe" question dealing with the rights of newborns.

This legislation is doomed if it is used by Congress to address these issues or any others except the effects of the *Grove City* decision. The strength of the coalition which supports H.R. 5490 and S. 2568 is founded on our mutual agreement to stand together in favor of this bill and against all efforts to change it.

Second, the realities of the legislative calendar, as you are acutely aware, dictate speedy action. Our organization, like so many others is prepared to devote massive resources of staff time and community support to the effort, but none of us can halt the legislative clock. I urge you to make every possible effort to move this legislation quickly. Amendments will only consume time and time is the thing we have the least of.

CONCLUSION

I am fearful of what may happen if this legislative effort fails. Within days of the *Grove City College* decision, several events occurred which made clear that if Congress did not act, the protections for women, minority group members, the disabled and the elderly would dwindle further away. Administration officials indicated they intend to apply the restrictive *Grove City* ruling, though technically limited to Title IX, to the other statutes for enforcement purposes. Certain enforcement actions then pending were dropped on the grounds that they no longer were appropriate under Title IX. Some colleges began to question whether they still would be under the same obligations with respect to nondiscrimination in their athletic programs. And surely, enforcement officials in every region of the country are now confused about the scope of their authority to investigate allegations of discrimination under each of these laws.

This legislation is urgently needed as a matter of law and policy. It is fully consistent with our national commitment to social justice. I urge these Committees and the Congress as a whole to act on it as quickly as possible.

Thank you for the opportunity to share the views of the ACLU on this important matter. I will be glad to answer any questions you may have.

Mr. **Edwards**. The next member of the panel to testify is Mr. Julius L. Chambers, president of the Legal Defense and Education Fund from Charlotte, NC.

STATEMENT OF JULIUS L. CHAMBERS, PRESIDENT, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Mr. **Chambers**. Thank you, Mr. Chairman. My name is Julius Chambers, and I appear as president of NAACP LDF, and thank the committees for this opportunity to testify in favor of the proposed legislation on behalf of the Legal Defense and Educational Fund. The NAACP Legal Defense Fund has been active for over 50 years in seeking to achieve equal treatment under the law for black persons. Title VI of the Civil Rights Act of 1964 has been a crucial force in the dramatic progress our Nation has made toward that goal in the past 20 years. I am here today to urge the committees to act expeditiously on the proposed legislation, to ensure that title VI is not emasculated as a force for further progress as a result of the Supreme Court's decision in *Grove City College* v. *Bell* (104 S. Ct. 1211 (1984)).

The Supreme Court in *Grove City* held that institutions that receive millions of dollars of Federal aid must be broken up into numerous offices, departments, and activities, and that only those subparts that receive the Federal aid directly are subject to title IX's prohibition against sex discrimination. Because of the similarity between title IX and title VI, which prohibits discrimination on the basis of race, color, or national origin, we fear that it is likely that the Supreme Court will extend the *Grove City* holding to title VI. If that occurs, a university could receive millions of dollars in student grants and yet be free to discriminate against blacks in all parts of its operation except the financial aid office. Bob Jones University currently is one of the three entities that are barred from receiving any Federal aid and has been held by the Supreme Court to be not even eligible for a Federal tax exemption. Yet, under the *Grove City* decision, Bob Jones could begin receiving Federal student grants, since there has never been any allegation that Bob Jones discriminates in its financial aid office. This result is ludicrous, not to mention immoral and contrary to Congress' intent in enacting title VI.

Let me briefly summarize some of the tremendous results that title VI has produced over the past 20 years, and that are threatened under *Grove City*. At the time title VI was enacted, very little progress had been made in achieving equal educational opportunities for black schoolchildren, notwithstanding the 10-year-old decision in *Brown* v. *Board of Education*. Millions of dollars of Federal aid was being poured into school systems that were almost completely segregated.

Enforcing *Brown* was a slow and expensive process, involving suits against individual school districts all over the country. Dramatic progress in this area was achieved after 1964, in large part because of the enforcement effort of the Department of HEW and the potent threat of fund termination.

Similarly, in the higher education area, the Legal Defense Fund's lawsuit in *Adams* v. *Richardson* has resulted in Federal efforts to desegregate approximately 20 State college and university systems that were previously segregated by law.

I note that in both the elementary and secondary education and the higher education areas, the enforcement effort would have been delayed and perhaps been completely stymied, if the Department has been required to identify and trace all the Federal funds received by these school systems and to determine whether they were used in discrete subparts that were discriminating. Even today, the Department of Education does not have the capacity to trace all of the Federal assistance it extends.

While title VI's major impact in the education area was in permitting Federal agency enforcement, in the health-care area, the emphasis has been on private enforcement. The Legal Defense Fund has represented private plaintiffs in several cases against hospitals that receive substantial amounts of Federal funds, challenging such practices as refusal to admit blacks, segregation of waiting rooms, bathrooms and blood banks, failure to accord staff privileges to black physicians, and closing or relocating hospitals in black neighborhoods.

This litigation effort would have been hampered and positive results might not have been possible if we had been required to show that the particular subparts of the hospital that were discriminating had received Federal funds. For example, we did not stop to ask whether the waiting rooms had been built with Federal dollars before suing to desegregate them; nor did we ask whether the department that determines staff privileges received Federal aid before suing to require equal treatment of black physicians.

The proposed statute restores the commonsense approach to coverage and fund termination under title VI that existed prior to the Supreme Court's decisions in *North Haven Board of Education* v. *Bell* and *Grove City*. Under the new legislation, an entire institution would be covered by title VI whenever any part of the institution receives Federal financial assistance. However, the fact that the institution is covered does not mean that all of the institution's funds can be terminated. Rather, the drastic remedy of fund termination can be invoked only in more narrow circumstances—when the funding actually supports discrimination.

This distinction between broad coverage of an institution and the more narrow remedy of fund termination is important because fund termination is not the only remedy available under title VI. Broad coverage permits administrative investigation, conciliation, and voluntary settlements even in cases where the pinpointing requirement would preclude fund termination.

Moreover, it permits the Department of Justice and private plaintiffs, such as those represented by the Legal Defense Fund, to sue in court for injunctive relief, without regard to whether funds could be terminated. Since the Justice Department and private plaintiffs never can obtain fund termination, there is no point in hindering their lawsuits with the tedious task of tracing and assigning funds to particular subparts of the entity which is discriminating.

In addition, I note that while fund termination is a potent weapon in obtaining voluntary compliance, actual termination is extremely rare. The experience of the past two decades indicates that in 1984 there are virtually no recipients that are willing to sacrifice Federal aid in order to continue their discriminatory practices.

During the 20-year history of title VI, there have been only 220 instances of fund termination by the Departments of HEW and Education, with all but one of these occurring prior to 1972. Despite an initial recalcitrance in the late 1960's and early 1970's, today all but three of the terminated recipients have regained eligibility of Federal aid.

In conclusion, I would like to urge that the proposed legislation be enacted expeditiously, without consideration of amendments that are not germane to the limited purpose of restoring the pre-*Grove City* status quo. There are many possible ideas to change or improve title VI and the other three statutes. Those proposals, including some that could be made by the Legal Defense Fund, must be researched and carefully considered on their own merits. Such proposals should not be permitted to delay passage of the bill now before the committees. While we have made much progress under title VI, we still have a long way to go in order to achieve equal treatment for persons of all races and colors. Immediate enactment of the proposed legislation is needed to send a clear signal that *Grove City* does not represent the green light for recipients to commence discriminating in vast areas of their operations.

Thank you very much. I would be pleased to answer any questions that you might have.

[Prepared statement of Julius L. Chambers follows:]

PREPARED STATEMENT OF JULIUS L. CHAMBERS, PRESIDENT, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

I would like to thank the Committees for this opportunity to testify on behalf of the NAACP Legal Defense and Educational Fund, Inc. The Legal Defense Fund strongly supports prompt enactment of H.R. 5490, "The Civil Rights Bill of 1984." This legislation would amend four federal civil rights statutes to counter the effects of the Supreme Court's recent decision in *Grove City College* v. *Bell*, 104 S. Ct. 1211 (1984). My testimony today will focus on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

Title VI prohibits discrimination on the basis of race, color or national origin in any program or activity receiving Federal financial assistance.[1] The purpose of Title VI is to induce recipients of federal aid to comply with the federal policy against discrimination on the basis of race, color or national origin and to ensure that federal aid is not used to support such discrimination. As President Kennedy stated when he proposed this legislation to Congress:

"Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."[2]

Federal financial assistance is extended to practically every sector and institution of society. To cite just a few examples, federal aid has helped to build hospitals and provide health care, to construct airports and highways, to provide housing, to improve education and recreation facilities, to revitalize urban areas, to support law enforcement and to provide foster care.[3] The U.S. Commission on Civil Rights has concluded that "Title VI is . . . the broadest instrument available for nationwide elimination of invidious discrimination and the effects of discrimination on the basis of race or national origin."[4]

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[1] § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

[2] President John F. Kennedy, Message to Congress on Civil Rights and Job Opportunities, June 19, 1963, Section 5, *reprinted in Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within The Jurisdiction of the United States*, Subcomm. No. 5 of the House Comm. on the Judiciary, ser. no. 4, pt. II, 1446–54 (1963).

[3] See U.S. Comm'n on Civil Rights, The Federal Civil Rights Enforcement—1974, Vol. VI, To Extend Federal Financial Assistance 3 (1975).

The pervasive scope of Title VI and the existence of other legal and social forces for change make it impossible to isolate and document the impact of Title VI. However, it is the belief of the NAACP Legal Defense and Educational Fund, Inc., that Title VI has been an instrumental element in the gains realized in the last two decades toward the goal of full equality and fair treatment for all Black citizens. The progress made in two critically important areas in which the Legal Defense Fund has been involved—education and health care—demonstrates the vital role that Title VI has played in the past twenty years.

The Legal Defense Fund has had a longstanding commitment to ending discrimination in health care. Historically, we have challenged segregation in hospitals and other health facilities and have sought to obtain, through litigation, legislation and regulation, the guarantee of equal access to health care for all persons regardless of race or color. Title VI has been a crucial tool toward achieving these goals, as well it should be, for billions of federal dollars, in the form of Medicaid, Medicare, Hill-Burton and other funds, are the fiscal foundation of health delivery in this country.

The Hospital Survey and Construction Act of 1946, Title VI of the Public Health Service Act, commonly known as the Hill-Burton Act, was passed to "assist the several states . . . to furnish adequate hospital, clinic, or similar services to *all their people*." (Emphasis added)[5] From 1947 to 1974, Hill-Burton grants and loans totaled approximately $5 billion. More than 70 percent of this amount went to the construction of hospitals; the rest went to other health facilities such as nursing homes. Despite the purpose of the Act to aid "all people," Hill-Burton regulations sanctioned "separate-but-equal" facilities until the Legal Defense Fund successfully challenged this approval of segregation in *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964). Indeed, congressional outrage at federal funding to build segregated hospitals figured prominently in the passage of Title VI in 1964.[6]

The passage of Title VI has made a significant difference in the access of Blacks to health care. Hospitals are no longer rigidly segregated as many were twenty years ago.[7] Because of Title VI, hospitals had to cease such practices as officially segregating patients, restrooms, and labeling blood by race in order to participate in the Medicare and Medicaid programs.

The Legal Defense Fund's efforts to secure equal educational opportunity for Blacks dates back to the litigation that resulted in the landmark decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Notwithstanding the ten-year existence of this decision prohibiting segregated education, the situation at the time of Title VI's enactment was bleak. For example, in 1962, the States of Alabama, Georgia, Mississippi, South Carolina and Virginia received a total of more than $35 million in federal aid for public school construction and operation. Yet, there was virtually total segregation of blacks and whites in the schools in those States.[8]

Similarly, in higher education and vocational training, the 1963 House report notes:

"Billions of dollars of Federal money is expended annually on research. This money primarily goes to universities and research centers for scientific and educational investigation . . . [A] number of universities and other recipients of these grants continue to segregate their facilities to the detriment of Negro education and the Nation's welfare.

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[4] Id.

[5] 42 CFR § 124.601 (44 FR 29397).

[6] The 1963 House Report noted:

> [E]xample after example is available which establishes that Negroes are denied equal treatment [in medical care.] Negro patients are denied access to hospitals or are segregated within such facilities. Negro doctors are denied staff privileges—thereby precluding them from properly caring for their patients. Qualified Negro nurses, medical technicians, and other health personnel are discriminated against in employment opportunities. The result is that the health standards of Negroes and, thereby, the Nation are impaired; and the incentive for Negroes to become doctors or to remain in many communities, after gaining a medical education, is reduced.
>
> In a related fashion, racial discrimination has been found to exist in vendor payment programs for medical care of public assistance recipients. Hospitals, nursing homes, and clinics in all parts of the country participate in these programs and, in some, Negro recipients have received less than equal advantage.

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) (additional views), reprinted in 1964 U.S. Code Cong. & Admin. News 2391, 2511-12.

[7] Id.

[8] See U.S. Comm'n on Civil Rights, supra, at 7.

Funds for guidance training of high school teachers and administrators are also unavailable to Negroes in a number of Southern States, while in the same regions, schools remain segregated which have been constructed, maintained, and operated by means of Federal financial assistance.

". . . Negroes are continuing to be denied equal protection and equal benefits under . . . [v]ocational and technical assistance, public employment services, manpower development and training, vocational rehabilitation [programs]".[*]

Title VI has been used extensively since its enactment to achieve fairer treatment of Black students. Prior to enactment of Title VI, expensive and time-consuming litigation against individual school districts was required to implement the Brown mandate. Dramatic gains in school desegregation were achieved after the 1964 largely because of the enforcement effort of federal agencies. In the early days of Title VI's existence, federal assistance was terminated for over 200 local educational agencies. However, despite their initial recalcitrance, all of these agencies have again achieved eligibility for federal aid. Countless other schools and school systems were brought into compliance without resort to the drastic step of fund termination.

In the higher education area, the Department of Health, Education and Welfare and the Department of Education have taken action against 19 State college and university systems that were previously segregated by law. Three of the States have been referred to the Department of Justice to pursue judicial enforcement. The other States submitted acceptable remedial plans during the administrative process. To date, no funds have been terminated from any of these State higher education systems.

Although substantial progress has been achieved under Title VI, the need for a strong and effective statue is still vital in 1984. Discrimination, once open and overt, has in many instances continued in covert and subtle forms. For example, in the health care area, equal access for Black persons is far from a reality. Hospital relocations from and closures in Black neighborhoods have increased barriers to access to care. Because hospitals are often the source of primary care for poor Blacks, hospital closures and relocations means that an important source of primary care is lost and that even fewer health professionals remain to serve the community. Increased travel time and expense make it likely that poor Black families defer obtaining medical care until their need is extreme.

The severe scarcity of physicians to serve Black patients is another continuing major problem. In large part because of historical and lingering discrimination, minority physicians continue today to primarily serve minority patients. Yet disproportionately few Black or other minority persons have completed medical school. Another pattern which contributes to lack of access is the limited willingness of the medical community to treat Medicaid patients and the reluctance of many hospitals either to give staff privileges to doctors who accept Medicaid patients or to admit patients who do not have a private doctor on staff. These practices have correctly been attacked under Title VI, as in the case of *Cook* v. *Ochsner*, a lawsuit currently pending against several hospitals in New Orleans, Louisiana, but much more remains to be done. The historic focus of the Office for Civil Rights on education has placed the major burden for securing nondiscrimination in health care on private litigants.

Equal opportunity in education also is far from a reality. The continued existence of private segregated academies that receive federal aid and federal tax relief undermine support for financially-strapped public education systems and inhibit desegregation. Thirty years after the *Brown* decision, the education of many Black students is both "separate" and "unequal."

In higher education, while many States have submitted remedial plans, severe problems in implementing those plans remain. Continued vigorous enforcement by the Department of Education is critical.

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[*] H.R. Rep. No. 914 supra, 1964 U.S. Code Cong. & Admin. News at 2511-12. The House Report also summarized the evidence presented during the Title VI hearings about the existence of widespread discrimination in other federally-assisted programs:

The school lunch program is another instance of unfair treatment. Through this program the Federal Government seeks to provide surplus food in order that needy children may have a nourishing meal at least once a day. . . . [T]estimony presented before our committee reveals that Negro children have been denied free lunches on the unfounded claim that their parents could afford to buy their noontime meals.

Similarly, Negro families have been denied access to or eliminated from receiving surplus agricultural commodities which are distributed by the U.S. Department of Agriculture. Whether through coincidence or otherwise instances of this nature have occurred in counties where resistance was strongest to the Negroes*BAD MAG TAPE**ERR01*' attempt to gain voting rights. . . .

The recent Supreme Court decision in *Grove City College* v. *Bell*, 104 S. Ct. 1211 (1984), could, if applied to Title VI, substantially undermine the statute's continued usefulness in combatting racial discrimination by recipients of federal aid. The Supreme Court in *Grove City* adopted an extremely narrow interpretation of the scope of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. The Court held that the statute's prohibition on sex discrimination in any educational "program on sex discrimination in any educational "program or activity receiving Federal financial assistance" requires that institutions be divided up into separate "programs" and "activities" and that discrimination is prohibited only in those parts of the institution that directly receive the federal funds. Grove City College received proceeds from Basic Educational Opportunity Grants to its students. The Court held that receipt of such federal assistance subjected the school's financial aid office to Title IX coverage, but that the rest of the institution was free to discrimination.

Because of the similarity between Title IX and Title VI, there is a significant likelihood that the Supreme Court will extend *Grove City's* restrictive reading of "program or activity" to Title VI. Thus, an educational institution that receives only student financial aid would be free to discriminate in all aspects of its operation except its financial aid office. For example, under the *Grove City* decision, Bob Jones University apparently would be entitled to receive student financial aid, since there is no evidence that the University discriminates in its financial aid program. See *Bob Jones University* v. *United States*, —— U.S. ——, 76 L.Ed.2d 157 (1983).

It is repugnant that any entity which functions as a systemic whole should be able to pick and choose the areas for which it will seek Federal funding in accordance with its notions of what areas it wishes to have subject to nondiscrimination requirements and which it does not. This result is morally indefensible and contrary to Congress' purpose in enacting Title VI.

In addition, while the *Grove City* case dealt only with student financial aid, the decision's ramifications possibly extend to the hundreds of different types of financial assistance covered by Title VI. As the result of Grove City, the agencies and the courts enforcing Title VI will be required to determine the relevant program or activity for each different type of federal financial assistance provided. For example, years of expensive litigation may be required to establish the "program or activity" that receives impact aid or social services block grants. Moreover, Title VI's coverage will vary from institution to institution, depending on the nature of the aid. The government will be required to identify and trace all sources of federal aid before it can even investigate whether discrimination exists. The effort expended over this preliminary question will substantially delay enforcement of Title VI's underlying policies and exhaust scarce resources that could be used in the enforcement effort.

The proposed legislation addresses these concerns and at the same time remains sensitive to the fact that fund termination should be used as a last resort to achieve compliance. The legislation accomplishes these goals by distinguishing between situations in which a recipient is covered by Title VI and the more limited instances in which funds can be terminated. Under the new law, an entire institution will be subject to Title VI's prohibition against discrimination if federal aid is received by any part. Thus, the entire institution will be subject to administrative monitoring, investigation and conciliation efforts to achieve voluntary compliance. In addition, the Justice Department and private plaintiffs will be able to seek injunctive relief in the courts against discrimination that exists anywhere in the institution. However, the new law will preserve the pinpointing requirement for fund termination, limiting this remedy to assistance which supports noncompliance. The proposed legislation thus upholds our nation's moral and legal commitment to a broad prohibition on discrimination, while protecting innocent beneficiaries of federal aid with a narrowly circumscribed fund termination remedy.

The proposed legislation explicitly recognizes that fund termination is a remedy of last resort, and that other means of enforcement will be successful in the vast majority of cases. When Title VI was enacted in 1964, the extent to which fund terminations would be necessary was unknown and Congress was appropriately concerned with limiting this drastic remedy. However, the experience of the past twenty years indicates that the mere threat of possible fund termination has been sufficient to bring about compliance in the vast majority of cases.

The success of other means of enforcement is illustrated by the experience of the Department of Health, Education and Welfare and the Department of Education in enforcing Title VI. During the twenty year history of Title VII there were 220 instances of fund termination, but only three of these terminated recipients today remain ineligible for federal financial assistance. These statistics indicate that in 1984 there are virtually no recipients that are willing to sacrifice federal aid in order to continue their discriminatory practices.

As my final point, I would urge that the proposed legislation be enacted without amendment. There are many possible changes and improvements to Title VI and the other three statutes that could be considered by Congress. In fact, the Legal Defense Fund has several ideas about improving and strengthening Title VI. However, we believe that this is not the time to consider such substantive changes. Such proposals should be subject to extensive investigation and research and be carefully considered on their own merits. In contrast, the purpose of the current legislation is to restore the understanding that existed prior to Grove City, and thus enable Title VI to accomplish Congress' original intent. Immediate passage of this legislation is needed to remove the doubt and confusion that exist, right now and to send a clear signal to federal aid recipients that Grove City does not represent a green light for them to commence discriminating in vast parts of their operations.

Mr. EDWARDS. Thank you, Mr. Chambers.

I yield to the gentleman from Wisconsin, Mr. Petri.

Mr. PETRI. Thank you, Mr. Chairman.

I appreciate both of you gentlemen testifying this afternoon. I ask any questions at all with some trepidation because I certainly cannot claim to be any great expert in this area. But I do have some questions nonetheless.

Broadening the *Grove City* decision so far as title VI is concerned seems to me to be without any real serious problems at all, but when we get into the Age Discrimination Act, and 504, those are areas that are still relatively newer in Federal litigation and in the law, and they have not been very well fleshed out in cases as to exactly what the situations are and how they apply in different situations.

I am concerned about practical situations where there are a lot of colleges now that are in marginal financial situations. They could conceivably be confronted with this problem not just rearranging their course load but with actual cash outlays of significant dollars in order to continue receiving both student loan funds and comply with 504, for example.

Do you see that as a problem or is it something that we can twist or interpret the law in such a way that people don't really have to have access if they are handicapped and they still can have—still comply?

Clearly there are a lot of old buildings that need fixing up and they are often found on campuses of less well-endowed institutions.

Someone could come in and say you have to install this equipment or you are not treating me equally and if you don't the kids going to the school or the students at the school will not receive student loan money. That could put them out of business real quick.

Mr. GLASSER. Of course this law does not alter the substantive law governing what such institutions would be obligated to do. It does not alter the substantive law with respect to determining what is discrimination and what is not discrimination.

What it really does—nor, I might add as my colleague, Mr. Chambers, pointed out—it does not provide for the cutoff of funds to any programs other than those which are ultimately found to be doing the discriminating.

What this law is it allows the Government and private litigants in to take a look.

If what you do is you create all these obstacles first, then you cannot even ever reach those questions including the ones you asked. That cuts it off at the pass. You would never know what the answers to those questions are.

The answers to those questions are going to be different in different factual circumstances and they are going to ultimately turn on what the Rehabilitation Act, for example, what section 504 says and what it means in a particular circumstance and whether something amounts to discrimination that requires a remedy.

All of that is down the road.

What this bill addresses is whether or not those questions can even be effectively addressed. It does not change the substantive law or the ultimate remedy. Therefore, we don't really think that that is a problem.

Mr. PETRI. Why would we have to include 504 in this law? Why couldn't that be addressed on its own merits in connection with funds that might be made available for construction of aiding in school facilities, something at campuses or something of that sort. It would be much more logical and directly related to it and would avoid this sort of threat.

Mr. GLASSER. I don't think it is a threat for the reasons I just said but the reason why I think it has to be included in there is that it raises exactly the same issue of language. It seems to me to be anomalous to have a standard for enforcement of one kind with respect to discrimination based on race or sex, and a standard of another kind with respect to discrimination based on handicapped for the purpose of being able to trigger the investigation in the first instance.

I continue to think that most of your concerns really have to do with the substance of what constitutes discrimination and with the remedies for that discrimination in particular circumstances. Whereas this bill really enables those questions to be engaged in a serious way. To create different standards for one discrimination for the purpose of launching an investigation than exists for another kind of discrimination, I think, would create in the law different degrees of seriousness of one discrimination over another.

That I don't think is desirable nor consistent with the intent of Congress.

The language in these statutes has always been the same and this bill is intended to give them that same language the same meaning.

Mr. PETRI. Would you concede or would I be wrong in asserting that there is a significant difference between 504 discrimination and, say, title VI discrimination in that to remedy 504 discrimination in a significant number of cases would involve expenditures of dollars, whereas in the other case it is a matter of working with people's attitudes. So you don't have that external in effect practical limits in the title VI situations of sex, race, color, or national origin discrimination that you have in title IV where you have to change the—in 504 where you have to change the real world.

It seems to me that that is a different category.

Mr. GLASSER. I don't think that distinction is quite as clear as you suggest. It has certainly been our experience in title VI and title IX cases that money very often is involved in very large amounts, sometimes to deal with remedies. For example, when you are dealing with sex discrimination in athletic programs, the expenditures of money on that are normally very large. It is precisely the complaint of recipient institutions in those kinds of lawsuits that they are being asked and forced to initiate and pay for and build a whole additional program where none existed before.

It is—the same is true with respect to measures required to combat racial discrimination in hiring and promotion of teachers in schools, for example, because systems had to be changed, tests had to be altered, screening procedures had to be changed, assignment procedures had to be changed.

This is not an unusual complaint. I don't think one can distinguish in any significant way between the two kinds of remedies. I also think it is not really a legitimate response.

If Congress means to out-lawyer certain kinds of discrimination and if the measures that are necessary to end that discrimination require the expenditure of money, then the expenditure of money cannot be an excuse to avoid the remedies. There may be assistance that is necessary. There may be Federal assistance necessary to help that.

As I say, that all goes to the question of remedy down the road. It doesn't go to the question of investigation and therefore I think that while these are important issues they are not really germane to the narrow focus of this bill.

Mr. **Petri**. Let me just——

Mr. **Chambers**. If I may add to that, Congressman.

Mr. **Petri**. Yes.

Mr. **Chambers**. Although I don't profess a great depth of expertise I have handled some 504 cases and that was in private practice, as well, and as Mr. Glasser said, Congress declared discrimination against the handicapped as a reprehensible act and something not to be condoned. I don't understand any basis for distinguishing here in this legislation between 504 and title VI and title IX.

The handicapped have been discriminated against and have been deprived of opportunities, and like the black or other minorities, have had to bring individual suits to challenge that discrimination.

This legislation enables the handicapped as it does the minorities to obtain Federal assistance and reach a much broader area of discrimination against the handicapped than would be possible in individual proceedings.

Discrimination against the handicapped having been prohibited by Congress, I think it is appropriate and necessary to have this kind of legislation here under 504 as under title VI to ensure that the handicapped, that women and others who are discriminated against are protected. So I don't see any basis for distinguishing as suggested between 504 and title VI.

Mr. **Petri**. Just a factual question. There is no reason—I can probably look it up—but are you aware, have the courts allowed in 504 litigation any cost-benefit standards whatever? Or is it required regardless of the cost to provide equal or comparable access or opportunity to people?

In other words, are we trying to—are we assuming the resources and going from there or do we figure it is fair to deprive 10,000 people a little bit in order to help one person or however it works out?

Mr. **Chambers**. Personally I don't know the answer whether a court has ever considered that, but I know that there are some cases, for example, under 504 where the court in determining the substantive violation has looked at aspect. As it has been suggested, in the interpretation and implementation of 504 and title IX and title VI, they have all considered the practical effect of what was being done. I don't think that in any instance that we have seen the Department of Education or the Department of HEW ignoring what can be reasonably done and what can be implemented and it applies to 504, title IX or title VI. It has not been a—it has not been a threat as I see it to any institution or governmental entity but it has been a great means for ensuring elimination of discrimination against minorities and women and the like.

Mr. **Glasser**. I would add that we are dealing with an interesting empirical set of data which means we know what the situation was before the *Grove City* case. Insofar as this bill is intended simply to restore the common understanding of what the law meant before the *Grove City* decision, one need only look at whether or not those terrible things happened before the *Grove City* decision—and they didn't.

Mr. **Petri**. You would say this would not broaden the law in any way?

Mr. **Glasser**. That is right.

Mr. **Petri**. Very good. Thank you.

Mr. Chambers, this morning Judy Goldsmith of the National Organization of Women pointed out that insofar as her organization was concerned, *Grove City* was already causing problems in the thrust of lawsuits all over the country.

Have you run into any problems already as a result of *Grove City*?

Mr. **Chambers**. We have had some concern particularly in the health area, Mr. Chairman, where we have litigation challenging discrimination against various practices within hospitals, for example, waiting room, and staff privileges, et cetera.

Mr. **Petri**. Under title VI?

Mr. **Chambers**. Title VI, yes. As I indicated in the testimony a moment ago, we didn't in those cases go into whether funds, Federal funds actually reached the waiting room, for example. We have some consent decrees pending now in which we have resolved some of those issues and we have some concern about whether the defendant in those cases will now be raising questions about whether all aspects of the hospital covered by title VI are involved. We have not as I understand actually had to go back to court to defend those consent decrees but those questions have been raised.

We are concerned that unless something is done quickly by Congress that we will be back in litigation.

In the school area where we have had some consent decrees there has been some concern about the impact of *Grove City*, and again, I think in the health area and education area where we have been principally involved in title VI, that some immediate reaction or response by Congress is imperative in order to avoid a number of cases I know that will probably be filed to change some decision or challenge some proceedings that are pending.

Mr. **Petri**. In other words, the word is going to get around?

Mr. **Chambers**. I think the word has gotten around.

Mr. **Petri**. Yes.

Mr. **Chambers**. I think a lot of people are just waiting to see whether there is a response by Congress, or some modification of the decision by the Court. Unless something comes shortly, I think we will see quite a bit of litigation.

Mr. **Petri**. All right.

We had presidents of two private colleges testify last week and they said that if this bill went through that it would amount to such a Federal intrusion in the operation of their colleges that they wouldn't accept students who had Federal aid any more. Is that going to result in these students who need the help and who want to go to these particular institutions, they are going to be discriminated against because of something we do here in the Federal Government?

Mr. **Chambers**. Well, I have not done any empirical study in that respect. I have a number of responses to it.

It is, first of all, the same type of argument advanced early by public institutions in challenging efforts to desegregate those institutions. With desegregation, those institutions have found that they are better institutions and their students are doing better.

In private institutions, where discrimination is practiced in any respect, I think it is often to women and minorities, to a woman to have to be exposed to that type of discrimination that is prohibited by these statutes. I think that this kind of legislation is necessary to ensure that those students are not exposed to that type of affront.

I don't think that most private institutions that I know of today can really afford to ignore student loan funds or the rest. The tuition and fees for education are just too much to go it alone.

I don't think, as President Kennedy said years ago, Congress ought to be in any way funding any type of discrimination with tax funds.

If the institution elects not to use those funds, then that is the decision of the institution. But I don't think the Congress ought to support any discrimination by those institutions.

Mr. **Edwards**. These presidents of private colleges said, "We have never discriminated. We have been wide open. We have never been accused of discriminating. Here you are making us sign all these papers."

Mr. **Chambers**. Well, I understand that, that some institutions are objecting to have to sign papers agreeing not to discriminate. This is necessary in instances—looking at the progress nationwide—to assure that discrimination does not exist.

I don't think Congress should eliminate the enforcement mechanism that is necessary to ensure opportunities across the board simply because a few institutions don't want to sign a piece of paper.

In other areas where we have the efforts by Congress to eliminate discrimination, Congress has found it necessary to take a broad sweep in many instances to make sure that even the employer who professes not to discriminate no longer does discriminate. Or the employer contends he is recruiting, as he should be, actually recruits without discrimination.

In order to make sure that institutions are not discriminating, it is essential that they sign the type of pledge or agreement that the Court addressed in *Grove City* ensuring that they are not practicing discrimination in any aspect of their operations.

Mr. **Edwards**. Thank you.

Do you have an observation on that, Mr. Glasser?

Mr. **Glasser**. Well, only to add that I don't think it is a real threat. I don't know which of those two institutions were, but if they were accepting students with college loans before *Grove City*, I don't think they are going to suddenly decide not to accept it after this bill restores the pre-*Grove City* situation.

Second of all, there are, as I said in my testimony, about 3,000 institutions of higher education in this country and virtually all of the public ones receive Federal funds, of course, and more than two thirds of the private ones do.

I strongly doubt that the effect of this legislation is going to be to trigger a kind of a massive revolution in how these institutions are funded. It may well be that one or two decide to do that. That is their option, but again, it is always useful for us to remember that all this bill is doing is restoring the situation that existed before the decision. If there wasn't anything terrible going on then, there is no reason to think it is going to go on the day after this bill is passed and signed into law.

Mr. **Edwards**. Thank you.

The gentleman from Texas, Mr. Bartlett.

Mr. **Bartlett**. Thank you, Mr. Chairman.

I appreciate the eloquent and helpful testimony of the two witnesses.

I want to clarify what I believe is in the bill and also the intent of your testimony to be sure I have it down.

It is your testimony that what this bill does—H.R. 5490 in its present form—is to restore us to the situation of pre-*Grove City*? That is to say, would either of you contemplate the requirement or the necessity for any new regulations to be issued by the agencies or would the existing pre-*Grove City* regulations be there?

Mr. **Glasser**. It would certainly be the common understanding of the civil rights litigators and advocates that the pre-*Grove City* situation, including the regulations, were consistent with the language that this bill contemplates.

In fact, although the word "recipient" did not appear in the statute, it appeared widely in the regulations and was commonly understood to mean that.

So we do not anticipate anything more than the restoration of the pre-*Grove City* situation.

Mr. **Chambers**. I agree with that. It is my understanding that that would be the case.

Mr. **Bartlett**. By "pre-*Grove City*"—I am trying to put this in laymen's terms—generally that means the entire institution of which some part of the institution is receiving Federal funds, the [illegible] institution would be covered by these civil rights laws but that the termination of funds would be limited, as a remedy to the finding of discrimination, would be limited to that activity which is involved in the violation of one of these laws; is that correct?

Mr. **Glasser**. That is correct.

Mr. **Chambers**. That is my understanding.

Mr. **Bartlett**. Thank you.

I wonder if you could give us some examples of the kinds of pinpointing of fund termination that would be determined if the general aid is going to be associated with noncompliance.

Do you have any examples in mind as to how you could—if general assistance is associated with noncompliance, how you narrow that down to a specific program activity?

Mr. **Glasser**. Of course that question almost answers itself, if the aid is general, then it is not specific, and it may be very difficult for the institution to do that.

Anybody who has ever handled a large budget in a large institution knows that unless money is very specifically earmarked and your books are set up to implement that restriction and to deal with the specific activity, general money is general money and I suppose institutions that wanted to insulate how it was used could do so.

Basically, the burden would be on the Government going in to show the nexus. The institution would be in the position of saying, "No, this money is not used for A, B, C or D; it is only for F, G, H, and I."

But if the money received was general money not restricted to a specific program and if it went to a general fund of the university, say, and the university used that money in ways that were spread out all over the university, then there would be no pinpoint.

But that has always been the case. This bill doesn't change that.

What this bill maintains is that if a general investigation of discrimination reveals discrimination exists, in many programs throughout the university, but does not exist in program X and program X is receiving Federal funds, then the Federal funds which program X is receiving may not be cut off. That is the situation that has always existed and that is the situation that this bill maintains.

Mr. **Bartlett**. Thank you.

One other question as to what this bill does or does not do.

In your judgment, does H.R. 5490 extend coverage or something else in the law extend coverage of these four civil rights bills to the U.S. Congress?

That is to say, is Congress required to comply with 504 or with the aging law? Does this bill extend to the U.S. Congress or is Congress covered today?

Mr. **Glasser**. Well——

Mr. **Chambers**. In terms of the language of this bill and its coverage of Congress, I would think that the Congress is covered, or any recipient, as I understand it, of Federal funds should be covered by the act.

I really would need to do some further study to submit something further to the committee in connection with that. That is not one of the questions that I had really considered.

Mr. **Bartlett**. Mr. Glasser.

Mr. **Glasser**. Similarly, I don't know the answer to that except to say that if Congress was covered by the various Civil Rights Acts before then, it would be still covered. If it was not, then it is not.

This bill does not alter the scope of coverage. It merely restores the meaning of the particularity of program and activity to what was commonly understood to mean the whole recipient.

Mr. **Bartlett**. In your judgment, as a matter of social policy should Congress be covered by section 504, by title VI, by title IX, and by Aging Discrimination Act?

Mr. **Chambers**. I expressed my personal opinion of what it should be, but I am advised that each of the statutes exempt Congress from coverage.

Mr. **Bartlett**. Pardon?

Mr. **Chambers**. Each of the statutes exempts Congress from coverage.

Mr. **Bartlett**. Each of these statutes exempts Congress from coverage. That is my understanding also.

Do you think those statutes should exempt Congress from coverage?

Mr. **Chambers**. Well, I expressed my personal opinion a moment ago about the coverage. I would think personally Congress should be covered. But whether it should be or not, that is not something I am prepared to testify with respect to today.

As has been indicated, all this bill does now is restore things to where they were before *Grove City*. All we are advocating is that this bill be enacted to restore the situation to the pre-*Grove City* situation.

Mr. **Bartlett**. Thank you, Mr. Chairman.

Mr. **Chambers**. Not extend the coverage or add Congress or any other entity.

Mr. **Bartlett**. Do you believe Congress should be covered, Mr. Glasser, by these four acts?

Mr. **Glasser**. My views are the same as Mr. Chambers, but that it take it is not an issue in this bill.

Mr. **Bartlett**. Thank you, Mr. Chairman.

Thank you to the witnesses.

Mr. **Edwards**. The Chair will advise the gentleman from Texas that we are not covered and that Mrs. Schroeder and I have a bill, and we invite your cosponsorship, that would include Members of Congress in all the civil rights laws. We think it is an outrage that we are not covered.

Mr. **Bartlett**. Mr. Chairman, I share your outrage and I would be happy—I would like to take a look at that bill.

Mr. **Edwards**. I will send it to you this afternoon.

Mr. **Bartlett**. But assuming it does unexempt Congress from the various laws we exempted ourselves from, I concur with your analysis and I would be happy to cosponsor the bill.

Mr. **Edwards**. Thank you.

Mr. Erlenborn.

Mr. **Erlenborn**. Thank you, Mr. Chairman.

I am sorry I am late as I was this morning but other obligations seem to have continued while these hearings went on.

I am sorry, let me say to the two witnesses, that I was not here to hear your testimony. I have raised an issue in the past which I would like to have you address, each of you, and that is your understanding of what difference—what will be done differently at Grove City College as a result of this legislation?

What discrimination has been practiced there that will not be terminated as a result of making certain that not only the institution but all of its activities are subject to title IX?

Mr. GLASSER. As you know, no one ever alleged that discrimination was taking place at Grove City. It never got to that point.

The issue of whether Grove City was covered in its entirety as a result of being recipients of Federal funds was a legal issue which was decided upon facts that were triggered by their refusal to fill out the forms and make the promises.

So there is in this case no actual instance of alleged, much less proven, discrimination. But what there is is a principle that emerged that institutions that do discriminate could effectively escape enforcement of the antidiscrimination laws by simply refusing to cooperate, that they will not discriminate, and by the creation of an obstacle that would make it very difficult, if not impossible, for the enforcement mechanism to proceed.

So the issue is not what would happen in Grove City, but what would happen at all the institutions in this country in which discrimination does exist and how easy it would be or difficult it would be to enforce the antidiscrimination laws.

Mr. CHAMBERS. I agree with that statement.

Mr. ERLENBORN. It seems a bit curious that the *Grove City* case was the one chosen to go all the way when there is no allegation of discrimination. Were there other cases that could have been utilized as the test case to go to the Supreme Court.

Mr. GLASSER. Low cases get to the Supreme Court are not unfortunately determined by the ACLU and Legal Defense Fund. But Grove City in effect initiated this dispute by not complying and that case, as litigation does, winding its way through the courts and got up there before any other case raising a similar issue.

It took everybody by surprise, as you know, because it is precisely the point of our testimony. that it was the common and unquestioned understanding before that case—that issue they were raising was not an issue. So it wasn't a matter of bringing that issue before the court. Nobody, at least among civil rights litigants, thought it was an issue.

Mr. ERLENBORN. That raises another question that maybe is just a matter of semantics, but I have heard you and earlier on other occasions, people say this legislation would merely return the situation to where it was before, the Supreme Court's decision. Is it your opinion that the law was something before the Supreme Court's decision and they changed the law and now we are going to put it back?

Or wasn't the law always what the court said it was; it just wasn't interpreted that way by people in the Government?

Mr. GLASSER. Of course until the Supreme Court interprets a law, it isn't always the way it was. Some of us thought school segregation was always unconstitutional, but naturally the Supreme Court said it wasn't. Everybody, both in the Government and private litigants, and as reflected in the regulations, will proceed for years on the unquestioned assumption that the statutes meant recipient.

That is the way the Government proceeded. That is the way the private litigants proceeded. That is the way defendants proceeded and that was the commonly understood interpretation of the law. Grove City initiated the challenge.

Grove City brought the case to the Supreme Court and in fact the Department of Justice opposed it. They sought to raise an issue which, as I say, had not been thought to be an issue before. When the Supreme Court agreed with them, that agreement changed the commonly understood interpretation of the law.

And we believe it changed the intent of Congress. We did not believe and no one had every suggested before that the intent of Congress was consistent with what the Supreme Court did. Everyone always assumed the intent of Congress was consistent with what H.R. 5490 purports to do.

Our view is that H.R. 5490 really reaffirms the original intent and makes it clear, which is now necessary because of the *Grove City* decision.

Mr. **Erlenborn**. I guess I would only ask that you might amend your statement to say most everyone, not everyone, because you may not be aware, but I was one who thought program and activity meant program or activity and not recipient or institution and said all along that Congress meant to—if the Congress meant to say institution or recipient, we would have, could have or we should have.

It seems to me, as I said earlier at these hearings, the Supreme Court is merely giving effect to the obvious meaning of the words. To read program or activity to mean something other than program or activity is not to give effect to the clear meaning of the words.

So when you say everyone agreed, it should be read "recipient," I and seven of my colleagues vote against resolution on the floor of the House that was meant to influence the Supreme Court's decision.

I think we showed that we did not agree with that interpretation.

Mr. **Glasser**. I stand corrected.

Mr. **Chambers**. I would accept that motiviation. I would like to say the NAACP and Defense Fund have, along with other organizations and civil rights litigants, understood the law to be other than as the Supreme Court decided.

I guess however it is not unusual for the Supreme Court to finally speak and speak at odds to accepted decisions in a number of areas like, for example, on seniority in title VII or intent and purpose in the voting rights area, and here in a program specific instance, under title IX.

As has been said, the Government interpreted the act to be other than as the Supreme Court decided and in many cases had taken the position completely at odds with the position finally advanced in the *Grove City* case. In fairness, and in order to ensure that all people are provided equal opportunities, it is extremely important that the act be amended, as is now proposed, to make clear that "recipient," rather than "program," or "activity," is what is intended.

Mr. **Erlenborn**. Thank you, Mr. Chairman. One last question.

I have heard other witnesses in the past in these hearings say this legislation will merely return the law to where it was before.

Is there no other substantive change than to make this apply institution-wide, rather than be program specific? Or aren't there other substantive changes contained either in the amendment to title IX or 540 or the Civil Rights Act?

Mr. CHAMBERS. It is my understanding that there are no other substantive changes; that the act is designed and understood by most everyone to simply restore the law to the position it was in before *Grove City*.

Mr. GLASSER. That is our understanding as well.

Mr. ERLENBORN. Thank you, Mr. Chairman.

Mr. EDWARDS. If there are no further questions of the members, we thank the witnesses, Mr. Glasser, Mr. Chambers.

The next hearing on this important bill is tomorrow morning at 9 a.m. in room 2175 of this building.

[Whereupon, at 2:12 p.m., the subcommittee was adjourned to reconvene Tuesday, May 22, 1984, at 9 a.m.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF SARAH CAMPBELL, SOPHOMORE, UNIVERSITY OF MISSOURI

My name is Sarah Campbell and I am a sophomore at the University of Missouri on a full ride scholarship for the women's basketball team. Coming from an inner city, all-black high school, my chances of going to a college were very slim. Athletics gave me an opportunity to go to a major university. At my high school, studies were not a major priority so coming to Missouri gave me a chance to futher my education. I couldn't even see myself going to a junior college because the funds were just not there. I come from a big family and I would have had no opportunity to attend school anywhere were it not for athletics.

I was recruited by over 250 schools for my basketball ability, and I chose Missouri for the program and the fact that it was close to home. I wanted my family to be able to see me play and the facilities and other services were better at Missouri than at the other places I looked.

I think there has been a big change at Missouri in terms of recognition just since I've been here. This has brought more coverage and more fans into the arena, it has made others know that there is a basketball program at the University of Missouri. This year, because our men had an off-year, the fans turned the other way and a lot of fans came to realize that we have a really strong program.

I started in athletics because it was my father's only wish that I be in sports. He wanted me to play basketball and four of my brothers played. It's something that I love and I enjoy—and I will be doing it until my body won't let me do it anymore. I apply things that I learn from athletics every day.

It takes a lot of discipline to be an athlete, and I have become more confident and disciplined off the floor as well. I think I have shown some leadership qualities both on and off the floor.

I would not be where I am today without Title IX. I would not be attending a university. If the Grove City case stands, it will hurt a lot of young people. There are a great number of female athletes out there who have the ability to be where I am, or even better, if they have the chance. I think it's critical that they have that chance.

Going pro is still an option for me, but I am looking more at my opportunities in special education, my major field. Being in athletics has taught me how to deal with all kinds of people, and it has taught me patience. Those are the two most important qualities to have in my area of specialty.

PREPARED STATEMENT OF RHONDA CLAYTOR, SOPHOMORE, UNIVERSITY OF MISSOURI

My name is Rhonda Claytor and I am a sophomore in education at the University of Missouri. I have been on scholarship to play softball at Missouri for the past year. I probably would have gone to college even without a scholarship, but more than likely I would have had to work while I was pursuing an education. I was a walkon as a freshman and did not receive any financial aid during my first year, but earned a scholarship this season.

I am the youngest of four childen and my parents have helped put my brothers and sister through college—I was fortunate that an athletic scholarship helped give my parents a break financially. They (my parent) have been paying for college for someone in my family for 17 years.

I derive a lot of personal satisfaction from my participation in sports. It's something I have been involved in since I was very young and my family has been very sports-oriented. I thought I could compete on a Division I team and I felt that I could be successful at this level.

Working with other people and achieving goals is one of the greatest things about athletics for me. It has taught me self-motivation and striving for your own personal growth, even though I am basically involved in a team sport.

There is a possibility of the emergence of another professional league in softball and that is always in the back of my mind. I would like to try it just for the experience. However, when I started playing softball that wasn't really my goal because the professional opportunity didn't exist. It wasn't a dream of mine.

There are always some people who are skeptical of women's sports—so I've had to learn to have confidence in what I'm doing. I think that quality will carry over into any profession I choose to pursue. I have learned how to be strong, which has really literally helped me physically as I deal with handicapped individuals in my major field (special education).

It seems to me that the Grove City decision, if it stands, will be a way out for all of the programs in the country which have just paid lip service to Title IX in the past. It's the easy way out for a lot of schools. We are only now reaching the point where we are making progress—where women's sports are getting more popular at the elementary and high school levels. I would hate to see that diminish in any way.

I don't consider myself extremely competitive, but physical fitness and the benefits of working out on a regular basis are very important to me. Softball is a different sport in terms of the competitive nature of it—it may not be as intense as some other sports. At times it seems to be a much an endurance contest as anything else.

I will always love the recreational aspects of sport as well as the competition. Title IX is important—I don't know that we ever would have started to have equal opportunity without it. There has been nothing harmful—only beneficial things—derived from Title IX, and its impact has been significant.

Prepared Statement of Janis Ehrhardt, Freshman, University of Missouri

My name is Janis Ehrhardt, and I am a G. Ellsworth Huggins scholar and a freshman on the women's swimming team at the University of Missouri. My hometown is Raytown, Missouri. I am on full scholarship, and although I would be attending college somewhere were I not on full athletic scholarship, I don't know that my opportunities in terms of college choice would be the same without that financial assistance.

I am also on an academic scholarship from the University, which has helped me in my major field of engineering. Since this is my first year at Missouri, I don't really have a basis of comparison in terms of the opportunities that the swim team have as opposed to other athletic teams in the program, but our competitive schedule and facilities are top-notch.

Athletics have helped me greatly to learn dedication and what it is to set and achieve goals for myself. In swimming, it's on an individual situation and each person has to qualify for national competition and to strive for their own personal perfection. The feeling of achieving and knowing that I'm a little better than people who don't get regular physical activity is very important to me.

I've been swimming since I was seven years old, and physical fitness has always been an importnat focus in my life. I hope I will always be fit, even after I have ended by competitive career here.

Sports has made me feel confident about myself—without that, I don't know if I would be as able to achieve scholastic excellence. Since my major is engineering, I haven't felt self-conscious about feeling comfortable in a field dominated by men. That situation doesn't intimidate me. Athletics has helped me to be able to relate to people better . . . I have had the role of mediator between other athletes and coaches and I enjoy that job as communicator.

This year I was the only member of the women's swim team to qualify for nationals, so I like to feel that in that respect I have become a leader by example. Sports have given me the outlet to enhance those leadership qualities.

I strongly feel that Title IX should apply to athletics as well as other departments of universities in this country that receive federal funding. If I weren't on scholarship, which is a direct result of the impact of Title IX, I would not be swimming today. It has made difference in my situation and I would hate to see the progress that has been made in women's athletics backslide in any way.

Prepared Statement of Ruth M. Berkey, NCAA Assistant Executive Director

This statement is submitted in my capacity as assistant executive director of the National Collegiate Athletic Association ("NCAA"). I have oversight responsibilities for all women's programs within the staff operations of the NCAA and actively work with the NCAA Special Committee on Women's Interests, which is a nationally representative group of women intercollegiate athletics leaders from NCAA member institutions.

Prior to my becoming a staff member of the NCAA during the fall of 1981, I served as director of athletics for men's and women's programs at Occidental College in Los Angeles, California. As a part of my responsibilities there I coached a number of women's sports during the years between 1960 and 1980.

The NCAA governs men's and women's intercollegiate athletic programs sponsored by its member institutions, conducts national intercollegiate championships for male and female student-athletes, and provides various other programs and services for both men and women.

This statement speaks primarily to the issue of equality of athletic opportunity for male and female student-athletes which, in my view, was the primary objective of Title IX. The NCAA, as an organization, is fully and irrevocably committed to the achievement of that objective and has undertaken special efforts to enhance women's athletics.

GAINS BY WOMEN AT THE INSTITUTIONAL LEVEL

The opportunities available to women in intercollegiate athletics have grown dramatically. Women's college sports is often cited as the area in which the greatest progress has been made since the enactment of Title IX. At NCAA member institutions, the number of female participants in intercollegiate athletics increased from 32,000 in 1971-72 to 64,000 in 1976-77; and rose by 1982-83 to 80,000. Thus, in a period of 12 years, women's participation in intercollegiate athletics increased 150 percent. The percentage of participants who were female also grew from 16 percent in 1971-72, to 31 percent in 1982-83.

The numbers of institutions sponsoring programs for women in specific sports have increased greatly during the period from 1971 through 1982, the number of NCAA member institutions sponsoring women's basketball increased 130 percent (from 307 to 705 institutions); the number sponsoring cross country increased 4,070 percent (from 10 to 417); softball increased 183 percent (from 147 to 416); swimming 149 percent (from 140 to 348); tennis 151 percent (from 243 to 610); track and field 447 percent (from 78 to 427); and volleyball 190 percent (from 208 to 603). The average number of women's intercollegiate sports programs sponsored by NCAA member institutions grew from 5.61 in 1977, to 6.48 in 1980, to 6.9 in 1984.

Important gains have also been made in providing athletically related financial aid to female athletes. According to the National Advisory Council on Women's Educational programs, in 1974, 60 colleges offered athletically related scholarships or grants to women; in 1981, 500 provided such aid.

Notwithstanding rising costs and limited revenues, institutional budgetary allocations for women's intercollegiate athletic programs have increased significantly in all three divisions of the NCAA membership. In 1973, NCAA member institutions' aggregate expenditures for women's intercollegiate athletics were $4.2 million; in 1977, $24.7 million; in 1981, $116 million.[1] The average institutional budget for women's intercollegiate athletics in all divisions increased from $6,000 in 1971-72 to $34,000 in 1976-77 (an increase of 467 percent) to $155,000 in 1981-82 (an additional 356 percent). The most dramatic gains were in Division I, which had a 914 percent increase in the first period (from $7,000 to $71,000) and a further 376 percent increase in the second (from $71,000 to $338,000).

These increases have occurred even though the growth in revenues generated by women's programs has not kept pace in any approximate fashion with the expansion of those programs. The degree to which women's programs covered their own costs decreased from 34.3 percent of total costs in 1978 to 28.2 percent of total costs in 1981. Yet, member institutions remained committed to providing the resources needed to expand athletic opportunities for women and, at all levels, the average financial contribution to women's programs increased.

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[1] In 1973, excluding football, on average women comprised 20 percent of intercollegiate athletes and were allocated 3.4 percent of institutional intercollegiate athletics budgets. In 1981, excluding football, women comprised 37 percent of the athletes and received 20 percent of the budgets.

WOMEN'S INVOLVEMENT WITHIN THE NCAA

In 1981, the NCAA membership adopted a governance plan under which women were guaranteed representation on all of the committees responsible for the conduct of NCAA affairs, and the various programs and services offered by the Association were extended to women's intercollegiate athletics.

Currently, 187 women occupy 230 positions on NCAA committees. These women represent 143 NCAA member institutions. Thirty-one percent of all committee positions are held by women. Women serve on nearly all NCAA committees and, in fact, the number of women on administrative, general, convention and special committees exceeds established minimums designed to ensure representation based upon the ratio of female to male participants in intercollegiate sports. The ratio of participants will be reviewed periodically to determine whether established minimums for women are appropriate based on developments in the administration of and participation in women's athletics. During the 1982-83 academic year the intercollegiate athletic participation ratio at NCAA member institutions showed 69.2 percent males and 30.8 percent females. I personally believe that as the effect of the membership legislation adopted in 1982 and 1984 at NCAA Conventions, insuring a minimum number of sports to be offered for women without regard to participation ratios, that the participation numbers for women will increase and, as a part of that, additional opportunities for women for service on NCAA committees will be provided.

The number of women delegates attending NCAA Conventions has increased from 159 in 1981 to 318 in 1984. As a part of the governance plan institutions were encouraged to send women delegates to the Convention and a fourth individual was added to the Convention delegate listing (identified as the primary woman athletics administrator) to insure this opportunity for women.

In 1981-82 the NCAA, at the direction of its membership, began offering intercollegiate championships for women. That year, the NCAA sponsored 29 women's championships in 13 sports. By 1984-85, the NCAA will sponsor 33 women's championships in 15 sports. Under policies adopted by the NCAA membership, these championships are financed on the same basis as men's championships. In an effort to encourage the growth of women's sports several exceptions to the championships policies for men have been allowed in the women's championships to encourage the growth of women's sports.

The NCAA guarantees payment of the game and transportation expenses of its championships for both men and women regardless of the revenue-generating potential of those championships. To date, gymnastics is the only women's championship that has generated sufficient revenues to pay its own costs. Consequently, the NCAA subsidized 28 women's championships offered in 1981-82 at a cost of $1.8 million and 30 women's championships in 1982-83 at a cost of $2.4 million. In 1982-83, NCAA expenditures for the 30 women's championships that were nonrevenue-producing exceeded its expenditures for the 31 men's championships that were nonrevenue-producing by 8.8 percent.

In addition, for the past three years, the NCAA has substantially increased the share of its promotional budget devoted to women's athletics. This share increased from 20 percent in 1981-82 to 34 percent for women in 1982-83. This year women's athletics is receiving 49 percent of the total $709,200 promotional budget. A substantial portion of these funds has been earmarked for a special effort program aimed at increasing the visibility of women's basketball and women's gymnastics. This special effort program includes allocations for feature stories on female athletics in print media, an annual press conference luncheon focusing on women's basketball, television coverage of women's sports and professional development seminars.

At the 1982 NCAA Convention, the NCAA membership voted that all member institutions must sponsor at least four sports for women, this policy to become effective as of September 1, 1985. Women's programs had not previously had specific requirements regarding the number of sports that must be sponsored by member institutions in order to have membership in the national organization.

At the 1984 NCAA Convention, the NCAA membership took another major step to ensure equality of athletic opportunity for women. Currently, to qualify for membership in Division I of the NCAA, institutions must offer at least eight varsity intercollegiate sports involving all male teams or mixed teams of males and females. NCAA legislation adopted this year requires such institutions affiliating their women's programs with the NCAA to sponsor a minimum of six varsity intercollegiate sports involving all female teams as of September 1, 1986; seven such teams as of September 1, 1987, and eight as of September 1, 1988.

Similarly, under current NCAA rules, to qualify for membership in Division II, institutions must offer at least six varsity intercollegiate sports for all male or mixed teams. Under new legislation adopted this year, Division II institutions affiliating their women's programs with the NCAA must sponsor a minimum of five varsity intercollegiate sports involving all female teams as of September 1, 1987, and six as of September 1, 1988. The NCAA believes that these new sports sponsorship requirements are considerably more demanding than the requirements of Title IX, and these membership criteria will make an important contribution to the continued development of increased athletic opportunities for women.

INVOLVEMENT OF WOMEN AT THE CONFERENCE LEVEL

In recent years, women's intercollegiate athletic opportunities also have increased markedly at the conference level. This year, 28 Division I conferences, 15 Division II conferences, and 17 Division III conferences are sponsoring women's competition. At all division levels, the number of conferences sponsoring women's competition in specific sports is growing. For example, at the Division I level from 1982-83 to 1983-84, the number of conferences sponsoring women's competition in basketball increased from 25 to 28; cross country, 15 to 21; field hockey seven to nine; golf, six to eight, swimming, 15 to 17; tennis, 20 to 22; outdoor track, 16 to 18; indoor track, seven to 10; and volleyball, 19 to 25.

COMMENTS ON H.R. 5490

As stated above, the NCAA is committed to providing equality of athletic opportunity to male and female student-athletes, and will remain so committed without regard to the action taken by Congress on H.R. 5490. Within that context, I would express my view with respect to the proposed bill.

As originally enacted, it was my understanding that Title IX applied only to specific programs and activities receiving Federal financial assistance. Both the Title IX prohibition against sex discrimination and the enforcement provisions of the statute were so limited. The rationale for a statute so structured was that the Federal government should not finance programs or activities in which discrimination exists.

H.R. 5490 would amend Title IX to broaden its coverage from the particular program or activity receiving Federal financial assistance to an entire entity and related subunit's receiving, directly or indirectly, any such aid, without regard to the nature or extent of the assistance or its proximity to or remoteness from the program or activity to be regulated or investigated.

A serious question should be raised as to whether it is reasonable or logical to maintain the premise that such remote receipt of Federal aid provides a logical basis for jurisdiction in such circumstances. I wonder whether this is not an excessive reaction to the Grove City case.

First, our legal counsel holds the view that Grove City did not go as far as some seem to think it did. For example, it would appear that a student who receives Federal work study assistance and competes in varsity athletics still brings the application of Title IX rules to that program. Thus, probably most, if not all, athletic programs at NCAA members still must meet the standards of Title IX. If that is in doubt, possibly the proposed legislation should deal with that kind of question; e.g., individuals receiving work study or BEOG funds bring the programs in which they participate under Title IX.

Second, the legislation—as I understand it—will bring under the Federal rule making and enforcement authority aspects that, in fact, do not receive Federal aid. The bill provides, I believe, that if one BEOG-aided nursing student attends Kansas State University, the K-State crew—a club sport only—would be under Title IX, the Big Eight Conference would be under Federal inspection and enforcement and the home economics extension course conducted by Kansas State at Junction City would be under Federal authority.

It is this type of pervasive extension of Federal rule-making authority, paper work, investigation and enforcement that has led to many citizens' desire for *decontrol*, not more control. Illogical extension of Federal policy, I believe, weakens respect for that policy.

Thirdly, throwing such a wide loop will bring added demands for inspection and enforcement—much of it directed at inconsequential matters—thus weakening, in my view, the enforcement and vital aspects of civil rights. I believe we all should keep our eyes on the main goal—equal opportunity for women as well as men.

Thank you for the opportunity to express my views.

PREPARED STATEMENT OF PAUL LEVY, FOUNDER AND PRESIDENT, THE WHOLE PERSON INC., KANSAS CITY, MO

I am Paul Levy, founder and President of The Whole Person, Inc. which serves people with disabilities in the 6 county area of Greater Kansas City. The Whole Person is a service and advocacy organization seeking to protect rights and expand opportunties for people with disabilities. In Greater Kansas City, there are approximately 130,000 persons with disabilities and about 10% of those (or 13,000) are classified as severely disabled.

First of all, I think it is important for me to share with you The Whole Person's experience with Section 504 of the Rehabilitation Act of 1973. In the first instance, The Whole Person was made aware of discriminatory practices at the University of Missouri at Kansas City through several students who related an experience in which they were not provided equal access to programs and/or services. We documented all of the information from each of these students and presented our findings to the UMKC administration. When the administration was unwilling to examine our findings or meet with us to develop simple remedies, The Whole Person had no choice but to file a formal complaint with the Office of Civil Rights, U.S. Department of Education. As a result of that, OCR came to the same conclusions as The Whole Person. In its submittal to OCR, UMKC set aside specific remedies within one year and continued until recent months to make modifications throughout the campus to bring it to near full accessibility. It is our firm belief that without our action, the university would not have advanced so close to this point today.

In the second instance, we became aware that the city of Kansas City, Missouri had not met its requirement to complete a transition plan and to survey the level of programming and provision of service available to its disabled citizens. When questioned about what programs and services in each department were made available to persons with disabilities, the city had no response. Because of their lack of cooperation, we filed a complaint with the Office of Civil Rights, Department of Health and Human Services. As a result of this complaint, the city was quick to budget and implement those physical and programmatic changes to bring it into compliance with federal law. This work continues to this day to make added changes in city-owned buildings and other programming.

Upon close reading and examination of HR 5490, there are a few comments that I would like to make. First, persons with disabilities are taxpayers. This gives us the equal right to make demands upon society for whatever is offered to the general public. Persons living with disability have a right to equal services and opportunities not only because they may or may not be taxpayers but because they are simply citizens of this nation. If cost is any consideration, which it need not be, the costs of including and expanding programs and services to include disabled persons would, of course, have a long-term pay off in giving us a further opportunity to repay society or contribute that much more. As in the case of *Grove City College* v. *Bell*, discrimination should not be permitted to exist because of a technicality in the law. This bill, HR 5490, would correct any technicalities that allow discrimination to continue.

Section 504 enforcement is not a costly process. We know this from first hand experience. This cannot, in any way, be an argument used against the Section 504 compliance process. This country has come so far in recognizing equal rights for persons with disabilities as exemplified in P.L. 94-142 (the Education for all Handicapped Children Act) and the Rehabilitation Act of 1973. As community groups such as The Whole Person and national efforts on behalf of disabled perons continue to sustain these rights and to seek further advances, it is important that we do not stumble on legal provisions which can allow discrimination. We need enforcements which continue to smooth the way to bring full rights and equal opportunities to persons with disabilities.

Thank you for this opportunity to present these points to you today. I urge you and other members of your committee to fully support HR 5490. Thank you.

THE WHOLE PERSON INC.

Enhancing the lifestyles of persons with disabilities

The WHOLE PERSON serves people with disabilities in Greater Kansas City and works toward expanding equal opportunities for disabled citizens across Kansas and Missouri. We make things happen! Change occurs because of our direct actions and our presence in the community. We have the expertise and perseverance to be Kansas City's organizational leader in assessing and monitoring situations which affect persons who have disabilities.

Our goal is to help disabled individuals gain control over their lives within their own homes and in their communities. We do this by helping individuals with needed services and by working with other agencies and organizations in the Greater Kansas City area. We bring together people, disabled or not, who are interested in the development of an accessible community for all. We work with individuals and groups to support projects currently underway, identify gaps in the service delivery system, establish new objectives and priorities, and develop unique programs to serve disabled persons.

MISSION

Our mission has not changed since our founding in 1978. The WHOLE PERSON is here to assist severely disabled people to live independently in the community and to encourage necessary change within the community so independent living is possible. Since incorporation, The WHOLE PERSON has continued to perform these valuable functions:

- ✓ Provide services to individuals and community groups which strengthen the integration of disabled people into community life;
- ✓ Serve as an advocate for the personal and collective rights of disabled persons in the areas of accessibility, education, employment, housing, transportation and all other areas of equal opportunity;
- ✓ Develop new resources in the community which support the independent lifestyles chosen by disabled individuals;
- ✓ Bring together individuals and groups in order to develop common goals and work toward achievement of those goals;
- ✓ Act as spokesperson for the disabled community to the general public, news media, legislative bodies and special interest groups.

INDIVIDUAL NEEDS

The rights of disabled people to control their own lives is central to the concept of independent living. The WHOLE PERSON addresses an individual's concerns through its Independent Living Assistance program. We are designated as one of approximately 150 "Centers for Independent Living" across the United States. The WHOLE PERSON's Independent Living program is supported by a grant from the Rehabilitation Services Administration of the U.S. Department of Education, a grant from the Kansas Division of Rehabilitation Programs, and an allocation from the Heart of America United Way.

The WHOLE PERSON staff is trained to work with each disabled consumer on his or her personal needs and to set goals which lead to independence. Independent Living services are offered to any adult with a permanent physical disability who lives in the six county area of metropolitan Kansas City. In addition to personal attention from staff, financial assistance loans may be available to consumers needing help with funding on a specific goal. Peer Counseling is also available from trained volunteers who are experts at both listening and demonstrating daily living skills.

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Information and Referral or I & R services are available to the general public. The WHOLE PERSON's I & R system contains an extensive collection of up-to-date disability information. Our library holds books, periodicals, pamphlets and brochures, reports, research studies, directories, bibliographies, and loose-leaf flyers on topics related to disability.

Interpreter services are provided within The WHOLE PERSON's office by a part-time interpreter. Interpreter services are available for deaf consumers who have a financial need for such services in the community. Training for management of a personal care assistant is given to those severely mobility-impaired individuals who need hands-on help to live unsupervised in the community. For more information about any of these individual services, contact our Services Manager.

AREAS OF CONCERN

The WHOLE PERSON addresses a broad range of community issues that affect disabled individuals. Major areas of concern which are given on-going attention by our volunteers and staff are:

Education

Educational institutions from elementary to post-secondary levels are mandated to provide an equal education for all students with disabilities. Each year The WHOLE PERSON publishes a disabled student's guide to courses, programs, and services in area community and four-year colleges as well as vocational and trade schools. We are also deeply committed to the development of alternative educational programs such as survival skills training and developmental programs leading to adult basic education classes and GED.

Accessibility

Access is an overriding issue for all areas pertinent to disability. Through monitoring of government agencies and recipients of federal funds, The WHOLE PERSON has advocated for compliance with Section 504 of the 1973 Rehabilitation Act. We have been responsible for opening city government, educational institutions, hospitals and other organizations to the disabled population. The WHOLE PERSON is a primary resource on accessibility and equal opportunity for businesses, corporations, community groups, governments and individuals. Technical assistance and training services are available for groups considering modifications to their programs or buildings so that they are usable by people with all types of disabilities.

ACCESS KC: A *Guide for Disabled Kansas Citians* is a compilation of accessibility information on 950 places of entertainment and public buildings in Greater Kansas City. Published in 1983, the first of its kind book for Kansas City is available in our office.

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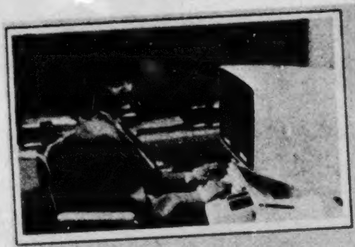

Employment

In order to expand employment opportunities, The WHOLE PERSON works with agencies and disabled consumers who are seeking jobs. Volunteers and staff of The WHOLE PERSON consider the evaluation, training and placement needs of disabled job-seekers through a task force on employment. This group works with existing organizations on issues related to the pursuit of vocational goals.

Legislation

The WHOLE PERSON keeps abreast of current legislation and regulations on national, state and local levels in order to make our position known to appropriate officials. Volunteers and staff provide testimony at public hearings, consult with legislators and other law-makers, and do necessary phone calling and letter writing. To muster support for needed laws or to oppose detrimental proposals, The WHOLE PERSON notifies interested community members and organizations of particular disability issues.

We maintain frequent contact with representatives of various departments in city and state government to keep a strong working relationship between The WHOLE PERSON and those levels of government. Voter registration is another serious commitment of The WHOLE PERSON. We work hard to assure that disabled people are registered and can vote with adequate information about political and public issues.

Housing

Whether developing new housing projects or promoting further utilization of existing units, The WHOLE PERSON realizes the need for accessible and affordable housing. The WHOLE PERSON conducted a project which surveyed over 700 apartment buildings and complexes in the Greater Kansas City area. Results of this survey are maintained in a file which is available for inspection by disabled people seeking private sector housing. Staff also helps consumers with locating subsidized housing and with landlord-tenant relationships.

Transportation

Affordable and accessible transportation services which cross political boundaries are essential to the freedom of disabled residents of Greater Kansas City. The WHOLE PERSON works with many different agencies and groups on the transportation problems of our metro area. A guide to area transportation services and providers is published on an annual basis.

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Personal Care

Personal care is an essential service for people whose disabilities severely limit their physical functioning. The WHOLE PERSON works with other advocates to establish adequate personal care services in the community. While staff provides training to consumers on management of their personal care providers, volunteers and other staff are advocating for the funding needed to establish a consumer-directed personal care assistance program for low-income consumers in both Kansas and Missouri.

PUBLIC EDUCATION

The Kansas City community has learned to turn to The WHOLE PERSON as a central resource for information concerning disabilities. Other information and referral organizations refer callers' questions pertaining to disability to us.

Community groups, schools and others have learned about disability from our Close Encounters Panel. This panel of people with various types of disabilities tells audiences about what it is like to live with a disability. It has been consistently successful in helping members of the general public accept disabled citizens and in correcting misconceptions. The WHOLE PERSON's role as public educator has also included speakers on topics related to disability, convener of local conferences and sponsor of community forums on specific issues.

The local media calls upon The WHOLE PERSON for comment or clarification when a disability issue is in the news. We continually provide information for use on radio and television as well as newspapers to keep the public informed and sensitive to concerns of disabled people in our community.

The WHOLE PERSON prints a bi-monthly newsletter to maintain an information channel with our membership, other organizations, news media and government officials. This publication provides an update on activities of our organization plus other local and national disability news. The newsletter usually includes special edition pamphlets on topics of interest such as education, housing, transportation, human sexuality and our Annual Report. These pamphlets can be pulled out of the newsletter and kept for future reference by readers.

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VOLUNTEERS

Much of what is accomplished by The WHOLE PERSON is the result of volunteers. These dedicated people serve on our Board of Directors, Board Committees, Sub-Committees or Task Forces on specific issues and in office job assignments. The WHOLE PERSON started as a totally volunteer organization and still relies heavily upon volunteers for its broad base of support. If you are interested in serving The WHOLE PERSON in any of our areas of concern or office tasks, please call our Volunteer Coordinator.

MEMBERSHIP

All individuals, organizations, and companies concerned with disability issues are welcome to become members of The WHOLE PERSON. We depend upon members to help us implement our programs and raise money for our services. Membership in The WHOLE PERSON automatically entitles the member to our newsletter and other special mailings.

The Board of Directors of The WHOLE PERSON is composed of persons with disabilities and others from the community who represent a wide spectrum of experience and skills. Our volunteers and staff are also representative of different types of disabilities, skills, and talents. With our ever growing organization, we are always looking for new ideas and expertise. For more information about how you can become a member of The WHOLE PERSON, write or call our office:

The WHOLE PERSON, Inc.
6301 Rockhill Road, Suite 305E
Kansas City, Missouri 64131
816/361-0304 (TTY/Voice)

The WHOLE PERSON is an incorporated not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code with an employer I.D. number of 43-1157083.

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Prepared Statement of Karen Holm, Associate General Counsel, Washington University, Kansas City, Missouri.

My name is Karen Holm. I am Associate General Counsel—one of the in-house lawyers—for Washington University, in St. Louis, Missouri. Washington University is a private institution, founded in 1851, with approximately 4,000 undergraduate students and another 4,000 graduate students.

As I understand it, this panel is addressing three questions concerning Title IX, and I have organized my comments around those three questions: (1) the impact Title IX has had on promoting women's participation in traditionally male-dominated fields; (2) the anticipated effect of the U.S. Supreme Court's decision in the *Grove City* case if there is no corrective legislation; and (3) the proposed corrective legislation—H.R. 5490.

My perspective on the first question is perhaps a narrow one. I graduated from the Washington University Law School in 1972, the year Title IX was passed. One hundred and one years before I graduated, the first woman to graduate from law school in the United States graduated from Washington University Law School.

In 1972, my law school class was ten percent women. I understand that law school classes across the country are now averaging thirty to forty percent women. I feel that this trend of increased enrollment of women in all the professional schools, not just law school, started before the enactment of Title IX, and that it was more the result of women deciding this was something they wanted to do than of a law being passed saying they had the right to do it. I would be interested in hearing from Dr. Jonas when he makes his remarks whether he has a different opinion about the effect of Title IX on the increased enrollment of women in medical school.

There are, however, at least two areas in which Title IX, in my opinion, has had a real impact on Washington University and I believe on other colleges and universities across the country. One, as you might expect, is women's athletic programs. Washington University has never had large men's athletic programs, so we did not have as far to go as some institutions in making our women's program comparable, but there's no question that significant changes, even for us, had to be made. You have already heard a very interesting and informative discussion of athletics and Title IX earlier this morning so I won't go into any more detail.

The other area in which I think Title IX has a definite impact is in forcing us to deal openly with the issue of sexual harassment on campus. Let me very quickly say that I am not one of those who believe that sexual harassment is rampant on the campus of Washington University or on the campus of any other college or university. To the extent that it has occurred, I believe, from what I know, that it has been in isolated instances. But those isolated instances in and of themselves were a problem which needed to be addressed. Title IX forced the issue. It required the designation of a Title IX Coordinator on campus and the setting up of a grievance procedure for students who had complaints of sexual discrimination of any kind, including sexual harassment. It brought the issue out in the open, and, on our campus at least, there has been a vigorous debate ever since about the extent and definition of the problem. I think that's a healthy development.

Turning now to the effect that the *Grove City* decision could have on the progress we have made in these two areas, it is hard for me to see how retrenchment is a very practical possibility, regardless of changes in the law. The problems I see *Grove City* raising are of an administrative nature. As you are aware, the decision essentially creates a jurisdictional crazy quilt for the Department of Education. Title IX would prohibit sex discrimination only in our programs and activities which are specifically federally funded. Washington University, last fiscal year, had approximately 650 federal grants and contracts, in a total amount of roughly $65 million. Our annual operation budget was $278 million. So you can see that our federally funded programs and activities are very much interspersed among programs and activities funded in some other way.

On the day the *Grove City* decision was handed down, there was a conference of the National Association of College and University Attorneys (NACUA) being held in Washington, D.C., and the Chronicle of Higher Education interviewed a number of the lawyers who were present about the possible effects of the decision. Virtually all of them, and they represented a number of different kinds of institutions, seemed to feel that *Grove City* would not have any practical effect on the gains made by women. Donald Reidhaar, General Counsel of the University of California and the current President of NACUA, said that he thought his institution received so much federal money that it would be impossible to trace which programs it affected and which it did not.

What I think these lawyers may not have realized at the time was that the Department of Education might have no choice but to try to trace funds, impossible or not. Secretary Bell indicated some time after the decision that the Department of Education would have to revise its regulations to reflect the ruling. The burden would be on the Department to establish its authority, and as a result there could be a significant increase in the paperwork and administrative burdens on both the agency and the institution, whether the college or university wanted to raise a jurisdictional issue or not.

The ultimate legacy of *Grove City*, as far as I can see, would simply be more litigation, trying to determine on a case by case basis how to apply what could turn out to be a simply unworkable concept.

I hasten to say that I do not believe that the Supreme Court felt this was a desirable state of affairs. The thrust of the decision, I think, was that, if one is going to apply well-settled rules of statutory construction and English usage, the words used by Congress—"program and activity"—were simply not subject to the interpretation given them, that Congress had not in fact, in plain English, said what it intended to say.

The logical response to *Grove City*, it would seem, is to do just what Congress is doing—correct the statute and the others on which it was modelled. As I understand it, the drafters have tried very carefully simply to restate, precisely this time, the originally intended scope of the statutes. As far as I can tell, on reviewing H.R. 5490, they have succeeded, except perhaps in one instance—the fund termination provision. That provision had originally read in pertinent part: "[T]ermination [of assistance] * * * shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been found." Everyone seems agreed that this provision was supposed to be interpreted narrowly; there was no contention that "program" in this context meant the entire institution. [See, e.g. the statements of Senators Dole and Leahy introducing S. 2568, Cong. Rec. 4594, 4598–4599 (April 12, 1984).] It is, therefore, unclear to me why this wording in the fund termination provision, as to which there was no confusion, is now being changed, particularly since the language they are substituting seems to me to be much more vague and arguably subject later to an interpretation that all federal funds (as "indirect assistance") would have to be cut off.

Fund termination, of course, does not happen very often. The parties may well be in court anyway in such a situation, and this would simply be another issue to be decided at that time. But it does seem to me to be one place in the bill where there might be some doubt as to whether the scope of the original law is being precisely restated.

Thank you for giving me the opportunity to make these comments.

PREPARED STATEMENT OF ALICE KITCHEN, WOMEN'S EQUITY ACTION LEAGUE AND THE KANSAS CITY METROPOLITAN REGIONAL COMMISSION ON THE STATUS OF WOMEN

Congressman Coleman and Committee members: My name is Alice Kitchen. I am here today on behalf of the local and national Women's Equity Action League and the Kansas City Metropolitan Regional Commission on the Status of Women. Both of these organizations have worked hard to ensure the implementation and vigorous enforcement of our civil rights laws.

We strongly support your sponsorship of H.R. 5490. We are equally pleased that we have bipartisan support from both Missouri and Kansas with the cosponsorship of Congressmen Wheat and Glickman. In reviewing some of the critiques of the Grove City decision the following implications are suggested:

Colleges like Grove City will continue to limit the form and destination of their Federal funds and thereby avoid enforcement of the letter and spirit of Title IX.

Enforcement of Title IX after Grove City leaves too much to the discretion of the Department of Education, Office of Civil Rights, the State, and the university/college officials without clear direction.

Other anti-discriminatory regulations within the institutions and States will not adequately offset the impact of the Grove City decision.

The negative impact of the Grove City ruling could be shortlived due to fiscal and demographic trends, but to us no less significant.

Experience related to the Maryland University case regarding discrimination in women's athletic programs suggests that the Department of Education Office of Civil Rights will continue to follow a very narrow interpretation of the law.

Court decisions like Grove City give the impression enforcement of civil right violations are no longer a priority for the Federal Government.

Status of Section 504 and Title VI in higher education could be affected as a result of this ruling since all three laws contain similar language. The programs specific standard for Title IX Grove City could also be applied to Section 504 of the Rehabilitation Act of 1973 as well as Title VI of the Civil Rights Act of 1964.

Discourages the Office of Civil Rights and the Department of Education from aggressively enforcing the spirit of the legislation.

For these reasons we believe it is imperative that clarifying legislation be passed. Without this clear interpretation and strong direction through legislation many years of civil rights progress stands to regress.

Both the Women's Equity Action League and the Commission on the Status of Women support full national commitment to the vigorous enforcement of Title VII of the Civil Rights Act of 1964, and Executive Order 11246, including full funding for the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, and actions aimed at broadening the interpretation of those laws so that they will address all forms of gender discrimination. Also, both organizations have in their 1984 priorities the vigorous enforcement of Title IX by the Office of Civil Rights of the Department of Education, particularly in the areas of athletic opportunities employment, sexual harassment, financial assistance, and professional school admissions.

Other related priorities include the vigorous enforcement of the Age Discrimination in Employment Act.

Effective implementation of our laws guaranteeing equal opportunity for women, the handicapped, the minorities, and the aged is in jeopardy. Without clarifying legislation, those charged with enforcing the laws and regulations will have an increasingly difficult job with no incentive or support to do aggressive enforcement. Given the Grove City decision administrators may circumvent the law with no social or legal penalty.

In the interest of protecting the safeguards that we have secured through Civil Rights legislation, we strongly urge you and your Committee menbers to pass H.R. 5490.

Thank you for bringing this Hearing to the Kansas City metropolitan area.

PREPARED STATEMENT OF DANIEL M. LAMBERT, VICE PRESIDENT, WILLIAM JEWELL COLLEGE, LIBERTY, MO

My name is Dan Lambert. I am Vice President of William Jewell College in Liberty, Missouri, and am present today representing my own college and those of an organization known as the Independent Colleges and Universities of Missouri. This consortium is comprised of more than twenty nonpublic and often church-related institutions reflecting a broad range in size, philosophy and mission. Through ICUM, members keep abreast of and address those matters of public policy which impact the well-being of the schools and their diverse constituencies.

Thank you for inviting our participation in these hearings.

The discussion before us, as I perceive it, involves not one but two principles important both to our colleges and the public good generally.

The first of these is a commitment to offer our educational services on a nondiscriminatory basis. As with our society at large, higher education was slow to recognize that many traditional patterns in our culture precluded women from the personal and professional options usually available to men.

While the vestiges of long term gender bias have not dissipated quickly, equal treatment for women has been achieved in may areas. Much of this progress may be attributed directly to Title IX mandates. Donna Slavik, staff affiliate of the American Council on Education, found that from 1972, when Title IX was enacted to 1980: the proportion of women earning medical degrees rose from 9 percent at 25 percent, similarly the proportion receiving law degrees increased from 7 percent to 32 percent, and the percentage of doctorates awarded to women moved from 16 percent to 32 percent.

Ms. Slavik also reported impressive gains by women in college athletics. In 1980, on the average 16.4 percent of a school's athletic budget was for women's sports, up from only 2 percent eight years previously. Concurrently participation in women's athletics increased by 250 percent.

Clearly then there has been substantial progress toward the goal of nondiscrimination in higher education. Just as clearly, much remains to be done.

The second principle which warrants our serious discussion is the preservation of a viable nonpublic sector of higher education in our country. This is an issue which goes directly to the educational diversity which has served America so well and the survival of colleges and universities which are free to pursue their missions independent of government regulation of their internal affairs.

If we are in the dilemma it is captured well in the *Grove City College* case.

Here is a college with a tradition of fierce independence, funding its needs through private funds and the church constituency which started the school. Grove City College carefully refused government funds "——— recognizing ———" as Justice Powell wrote in his concurring opinion to the case "——that with acceptance of such assistance one surrenders a certain measure of the freedom that Americans always have cherished."

Hence when Grove City students applied for federal grants, the College opted for the Alternative Disbursement System which made the government, not the college, the administrator of those funds. This course, it was assumed, maintained the school's autonomy yet permitted students to receive funds for which they would be eligible at colleges less concerned about their independence from government regulations.

The new twist here and one obviously not anticipated by Grove City is the Court's finding that the federally-assisted student becomes conduit for government regulation of his or her college.

However, the Court also ruled that even though Grove City was a recipient within the meaning of Title IX, government regulation applied only to the program directly aided by the federal grants, the College's own financial aid program.

If adopted, H.R. 5490 would remove the "program-specific" limits placed by the Supreme Court and would permit the federal government to regulate virtually every aspect of a school on the grounds that some of its students accept federal grants or loans.

Those of us in the private sector have grave reservations about this legislation. though the Court's decision in *Grove City* substantially increased our exposure to government regulation through federally assisted student aid, the interpretation of Title IX as program-specific permitted schools to participate in the covered programs with the knowledge that regulation extended no further than the public monies its students received. In the absence of this narrower view, schools such as Grove City which have refused government money to avoid government regulations will be as subject to federal control as those colleges and universities which through the years have received massive sums in direct public subsidies.

Our concerns about the proposed legislation are these:

(1) Removing the program-specific feature of Title IX damages, perhaps irreparably, one of the surviving distinctions of private higher education. One must wonder what incentive there would be for non-public institutions to continue financing themselves when federal student aid brings as much control as would larger direct government subsidies.

(2) The legislation is a very real threat to many small, church-related colleges whose existance is essential to higher education diversity in our county. The choice for these is simply stated: they admit students who receive federal aid and thereby accept the concommitant government regulation of their operations, or they face the vagaries of a highly competitive market (characterized by an unprecedented decrease in the pool of college-age people) already at a disadvantage to those schools whose students can accept the federal aid. Bruce Hafer, president of Ricks College says it this way: "If the only way to avoid massive federal intrusion is for a private institution to refuse admission to students receiving federal grants or loans, schools which give priority to preserving their independence will be forced by obvious marketplace factors into sharply reduced enrollments and consequent financial disaster."

(3) We fear that the removal of the program-specific limitation coupled with the private cause of action granted in the *Cannon* case will greatly expand our exposure to time consuming and expensive litigation. Many schools already have experienced the drain of their resources which results from complaints growing out of the various antidiscrimination legislation. Certainly remedies for such ills are justified, but the relative ease with which a college can be sued or become the target of an administrative complaint encourages many groundless allegations. The school, its students facing the potential loss of federal aid, has no choice but to employ counsel to defend its interests. When complaints are found to be groundless, which is true in many cases, the school has no way to recover its expenses.

As stated earlier, the impact of Title IX has been demonstrably profound. Its earliest effect was to raise the collective awareness of the inequities women faced on the typical campus. This was accomplished through a thorough self-study required of each college participating in federal programs assumed to be covered by the statute. These reports, which examined all internal activities and programs, provided each college and university a blueprint for correcting any of its policies which were found to be sex-biased.

It was this process, which beyond anything else caused colleges and universities to internalize the principle of nondiscrimination and committed schools to policies in which equal treatment of the sexes if central. In the early years of Title IX many educators assumed that it applied only to programs of direct federal assistance; aid to students was not then thought to be aid to institutions. Nonetheless, most schools sought to eliminate biases throughout their programs and facilities, acting out of a sense of rightness as much as a sense of requiredness.

If this analysis is accurate, the Grove City finding of Title IX's program-specificity will not diminish the commitment to equal treatment of the sexes.

Clearly we do not face a forced choice in resolving this issue. Public policy should require that government benefits be disseminated on a nondiscriminatory basis, and similarly, there should be reasonable regulation of those institutions which deliver those benefits.

But government oversight and the autonomy of the local agency can be achieved by the sensitive balancing of these competing interests of the kind provided in the Grove City case. We recommend that the Court's wisdom be preserved by retaining the program-specific language of the original statute.

Let institutions which want federal money be aware of and prepared for the government regulation of their internal affairs. However, those schools which decide against direct public funds should be permitted to enroll students receiving federal assistance with only that government regulation which was approved in the Grove City case.

REFERENCES

Grove City College v. *Bell*, — U.S. — (1984), No. 82-792 (S. Ct. 1984).

Hafer, Bruce C., letter dated April 13, 1984.

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CIVIL RIGHTS ACT OF 1984

TUESDAY, MAY 22, 1984

House of Representatives,
Committee on Education and Labor, and
Committee on the Judiciary,
Subcommittee on Civil and Constitutional Rights,
Washington, DC.

The committees met, pursuant to call, at 9:30 a.m. in room 2175, Rayburn House Office Building, Hon. Don Edwards (chairman of the Civil and Constitutional Rights Subcommittee) presiding.

Members present: Representatives Perkins, Kildee, Packard, Gunderson, Erlenborn (Committee on Education and Labor); Representatives Edwards, Kastenmeier, Conyers, Sensenbrenner (Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary).

Staff present: Ivy L. Davis, assistant counsel; Philip Kiko, associate counsel (Committee on the Judiciary); John F. Jennings, counsel; William Blakey, counsel; Rose M. Napoli (Subcommittee on Civil and Constitutional Rights, Committee on Education and Labor).

Mr. **Edwards**. The committee will come to order.

The Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary will continue hearings this morning on H.R. 5490. This bill reaffirms the broad coverage of the major Federal antidiscrimination laws, and we feel that it is needed because of the recent Supreme Court decision in *Grove City* v. *Bell*, which limits the coverage of title IX.

We are pleased to have as our first witness today Mr. Harry Singleton, Assistant Secretary, Department of Education, and the other member of the panel will be William Bradford Reynolds, Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice.

We welcome you. Without objection, both full statements will be made a part of the record.

Mr. Reynolds, do you want to go first?

STATEMENT OF WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. **Reynolds**. Thank you, Mr. Chairman.

Mr. Chairman, and members of the committee, I welcome this opportunity to appear before you today to present the views of the Department of Justice on H.R. 5490, the Civil Rights Act of 1984.

Let me preface my remarks on the proposed legislation by stating first my personal intolerance—and the abiding intolerance of the President, the Vice President, the Attorney General and every other member of this administration—of discriminatory conduct, in whatever form and however manifested, against any person on account of race, color, sex, national origin, handicap, religion, or age.

The nondiscrimination principle—embodied in the ideal of a Nation blind to color and gender differences—is at the center of America's historic struggle for civil rights. Accordingly, ours has been a profound and unwavering commitment to ensuring every citizen an equal opportunity to compete fairly for the benefits our Nation has to offer—no matter how he or she might be grouped by reason of personal characteristics having no bearing on individual talent or worth.

And, whenever discrimination interferes with that legal and moral command—whether it be viewed by others as benign or pernicious—the administration has not hesitated to bring the full force of the law down on the discriminator.

There is another principle that this administration has been every bit as vigilant in protecting the principle of federalism that is at the foundation of our Nation's dedication to the ideals of self-government and individual freedom.

We have, therefore, resisted unnecessary and overly intrusive expansion of Federal power, particularly when the Federal intrusion unduly impedes State and local governments' efforts to deal effectively with regional and local problems that most directly affect citizenry at the State and local levels.

H.R. 5490, as currently drafted, poses a tension—in my view, an unnecessary tension—between these two important principles of equal opportunity and limited Federal involvement in State and local affairs. That, in itself, is not remarkable, since it has always been the case that Federal laws directed at protecting the civil rights of all Americans necessarily intrude on the domain of State and local law enforcement.

The Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the Education Amendments of 1972, the Rehabilitation Act of 1973, to mention but a few, along with the various amendments to each of these statutes, bring into focus the tension I have mentioned.

Heretofore, however, Congress has undertaken—through thorough and extensive deliberations, comprehensive hearings, open and rigorous floor debate, and the amendment process—to ensure that the Federal role in the civil rights arena is as comprehensive as necessary to satisfy the need—based on congressional findings—for strong Federal protections against discrimination, that is, the Voting Rights Act of 1965, but not so overly intrusive as to usurp unnecessarily legitimate State and local prerogatives, that is, the Federal funding statutes that cover only those programs or activities receiving Federal financial assistance.

We would hope, and expect, that Congress would put the Civil Rights Act of 1984 (H.R. 5490) through the same close scrutiny, and subject it to the same rigors of an open and freewheeling debate in committees and on the floor of the House and Senate that has been the strength of past enactments of civil rights legislation. Let me explain why, in the Department of Justice's view, it is critically important that this process not be short circuited.

H.R. 5490 has been offered as a modest amendment of existing statutes, intended not to break new ground, but only to overturn the Supreme Court's recent decision in *Grove City College* v. *Bell*, 104 S.Ct. 1211 (1984), to the limited extent that the Court held title IX of the Education Amendments of 1972 to be program-specific in its coverage.

Title IX, as you know, bars discrimination on account of sex, in any education program or activity receiving Federal financial assistance. The Supreme Court in *Grove City* ruled that a college which enrolled students receiving basic educational opportunity grants (Pell grants) was subject to title IX coverage, but that the prohibition against sex discrimination applied, not to the college as a whole, but only to the federally funded program at the college—in this instance, the Student Aid Program.

Much as been said since *Grove City* about the Court's so-called new interpretation of title IX, and considerable impetus for the current congressional interest in amending that statute comes from an assumption that the Court's pronouncement of title IX as program-specific legislation altered the state of the law.

Simply to set the record straight, I would point out that the Court's programmatic reading of title IX represents no change in the law. While some Federal agencies had previously pursued a more expansive reading of the statute—one contemplating institution wide coverage of title IX—the fact is that, before *Grove City*, every court of appeals except the third circuit in the *Grove City* case itself had construed title IX to be program-specific in coverage.

Indeed, as to the parallel Federal funding statutes dealing with race discrimination—Title VI of the Civil Rights Act of 1964—and with handicap discrimination—Section 504 of the of the Rehabilitation Act of 1973—they, too, had consistently been interpreted by the Federal appellate courts as program-specific.

Thus, testimony provided to those committees regarding, for example, the dramatic strides made by women in college athletics since title IX was enacted in 1972 should properly be evaluated with the clear understanding that those strides were made under a program-specific statute, understood as such and consistently so interpreted by the Federal courts.

The Supreme Court in *Grove City* simply directed the third circuit court of appeals—which alone among Federal appellate courts has construed title IX to have institutionwide coverage—to get in line with existing judicial authority in this area, including earlier Supreme Court precedent.

Nonetheless, we agree with many Members of Congress that there are sound policy reasons for Congress to consider an amendment to title IX that will change its progammatic coverage to institutionwide coverage.

In fact, I was accurately reported as stating as much immediately following the court's announcement of the *Grove City* decision. A bill currently pending in the House, H.R. 5011, introduced earlier by Congresswoman Schneider, would effectively accomplish this objective by making title IX coverage apply to the educational institution as a whole in the event that any of its education programs or activities receive, directly or indirectly, Federal financial assistance.

That is, in my view, the best way to accomplish the stated purpose of amending title IX, and it is an approach that this administration can fully support. Indeed, Congress might well wish to consider expanding H.R. 5011 so that its institutionwide coverage pertains to discrimination on account of race, age and handicap, as well as on account of sex.

H.R. 5490 takes a far more expansive approach than the original Schneider bill, H.R. 5011. Thus, H.R. 5490 would amend not only title IX, but also three other civil rights statutes prohibiting discrimination in federally funded programs: Title VI of the Civil Rights Act of 1964 (race discrimination); section 504 of the Rehabilitation Act of 1973 (handicap discrimination); and the Age Discrimination Act of 1975 (age discrimination).

As a consequence, the education nexus that defined title IX coverage is not an essential feature of the proposed amendment. Of much greater concern, however, is the bill's departure from the existing statutes' programmatic approach, a departure that sweeps much wider than the institutionwide formulation in H.R. 5011 and embraces a coverage formula tied to an expansive definition of the recipient that recognizes few, if any, limits.

In sum, the proposed amendment goes well beyond the articulated need for a change in the law that was voiced so often after *Grove City*.

If that is, indeed, the congressional desire, if it is Congress' intent to enact new legislation that significantly expands the current laws addressing Federal civil rights enforcement, that effort can be most constructively accomplished, we think, by openly acknowledging the more expansive purpose underlying H.R. 5490 and forthrightly describing its full reach—which, by design, goes well beyond simply undoing the effects of *Grove City*.

In this manner, the complexities, ambiguities, and inconsistencies in the proposed language can be subjected to thorough review in both houses and thus profit from the collective wisdom of the Congress. Let me briefly discuss some of the most troublesome concerns.

1. DEFINITION OF "RECIPIENT"

H.R. 5490 deletes the phrase "program or activity" from the existing statutes and substitutes in its place the word "recipient." Thus, the four statutes would prohibit discrimination "by any recipient of" Federal financial assistance, not just discrimination within a recipient's federally funded programs or activities.

The bill includes a definition of recipient that the sponsors claim is drawn from existing Federal regulatory definitions of that term under title VI, title IX and section 504. That claim is partially correct, although a recipient, as used in the existing regulatory scheme, is subject to coverage only as to its funded "programs or activities." By contrast, under H.R. 5490, a recipient is to be covered in its entirety.

Beyond that, it should be pointed out that the bill's definition of recipient goes farther than any of the present regulatory definitions, adding at the end the new clause: "or which receives support from the extension of Federal financial assistance to any of its subunits."

Thus, the bill's definition, in its entirety reads:

> The term recipient means—
>
> (1) Any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

There is, admittedly, ample room for debate as to the exact breadth of this language. No definition of "receives support" is included in the bill and, thus far, statements by the sponsors and by witnesses at these hearings have provided little guidance as to the true legislative intent.

At a minimum, it seems clear that the term "recipient" is at least broad enough to ensure coverage of an educational institution where Federal funds are provided to one or more of its programs or activities, and thus the Supreme Court's programmatic interpretation of title I in *Grove City* would be overturned.

It appears, however, that the definition of recipient would also reach all campuses of a multicampus university, that is, University of California, if any Federal funds went to just one campus, or to students—through a Pell grant—enrolled at only one college campus.

Also, Federal funds going to an undergraduate program would, under H.R. 5490, seemingly include all graduate programs within title IX coverage, even though there was no Federal financial assistance at the graduate level.

Less clear is the intended scope of coverage under H.R. 5490 with respect to a college or university's commercial property. Rental property occupied by students or faculty would seem to be covered.

But, also within reach of the broad recipient definition would well be university housing space rented to persons who are neither faculty nor students, or, for that matter, other commercial activities not associated with education, so long as it can be maintained that the noneducational enterprise receives support from the college or university that is in some aspect extended Federal financial assistance.

Such an interpretation not only brings into play title IX, but also title VI, the Age Discrimination Act, and section 504. Thus, for example, the regulatory requirement to make facilities accessible to handicapped individuals would, under H.R. 5490, apparently apply to the noneducational ventures of a university as well as to those associated with its educational activities.

Nor does that necessarily define the outer limits of coverage. As H.R. 5490 is written, when Federal financial assistance is extended to a subunit (not defined) of a larger entity (not defined) the larger entity itself, whether it be public or private, can be viewed as the recipient if it is deemed to have received support from (not defined) the Federal funds going to the subunit.

Thus, if a Federal agency extends Federal assistance to a State university system, all other State departments or agencies—whether or not they are educational or perform an education service—would presumably be brought within the coverage of the four statutes because the State receives support from the Federal assistance to the university system.

The clear contemplation appears to be that this "trickle up" theory of coverage will permit—indeed, perhaps require—Federal agencies to investigate claims of discrimination against a nonfunded component of State government if some other component is funded.

For example, if a county water department receives a grant from the Environmental Protection Agency to study the county's sewer needs, H.R. 5490 would appear to provide that all of the county's operations are subject to all four civil rights statutes since the Federal financial assistance can be said to give support to the county.

Should EPA receive a complaint alleging discrimination in part of the county's operations that receive no separate Federal funds, that is, the county's road maintenance—under the bill, EPA would presumably have the responsibility to deal with the allegation of discrimination, even though that agency has no knowledge or expertise in this area. It would fall within the province of the Department of Transportation.

There is, as well, a "trickle down" theory of coverage under the proposed recipient definition. If the large entity receives Federal financial assistance, all subunits are swept within the coverage provisions—whether funded or not and whether or not they receive support from the funding.

Thus, a Federal block grant to the State for educational purposes would likely bring all political subdivisions of the State under the civil rights oversight responsibilities of the Federal Government. Since there is no State that can claim it operates entirely free from Federal financial assistance, the extent of Federal intrusiveness into State and local affairs under H.R. 5490 seems to be virtually complete. And, both the "trickle up" and "trickle down" theories apply with equal force to private commercial ventures and enterprises.

Moreover, all successors and assignees or transferees of a recipient become, under H.R. 5490, recipients in their own right. Thus, the bill could be construed so that Federal food stamp programs would subject participating supermarkets and local grocery stores to Federal civil rights compliance reviews and complaint investigations.

Pharmacies and drug stores that participate in medicare/medicaid programs could also be recipients, as could the transferee of an individual's social security check who, upon acceptance of such payment, would have—albeit unwittingly—signed an open invitation to Federal enforcers to enter and investigate.

While there have been pronouncements by some Members of Congress on the Senate side that the amendments are not intended to have such scope, the bill's language fails to preclude so broad a reading.

Indeed, the express exclusion from coverage afforded by the existing regulations to ultimate beneficiaries of Federal aid was not carried over in the statutory definition of recipient, and thus the reach of the statute that I have suggested seems likely.

2. ENFORCEMENT PROVISIONS

In addition to expanding the substantive coverage of the nondiscrimination funding statutes, H.R. 5490 also substantially alters—albeit again without any degree of clarity or precision—the standards and methods of enforcing these statutes.

The bill would retain the existing enforcement options for the four statutes: Federal agencies would enforce either by fund termination by the particular Federal funding agency or by referral to the Department of Justice for litigation—any other means authorized by law—private parties would continue to have a private right of action. The scope of these enforcement mechanisms is measurably expanded, however.

As to the fund termination provisions. H.R. 5490 replaces the current "pinpoint" language—which limits fund termination to the particular program that has been discriminatorily conducted—with new language providing for termination of the particular assistance which supports the discrimination.

The ambiguity introduced by the "supports" phrase opens the way for a possible interpretation of the four statutes that would permit fund termination of a worthwhile and needy program which has never been operated in a discriminatory manner because the Federal funds going to it provide support for another nonfunded program involved in unlawful discrimination.

The new termination provision also admits of the argument that any Federal assistance which goes to the entity as a whole necessarily supports the discrimination of the components parts and is thus invariably vulnerable to fund cutoff.

This broad potential for eliminating Federal assistance programs would severely undermine the original intent of the program-specific limitation in title VI, which "was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discrimintatory practices."

Nor does this broad interpretation appear to be consistent with the overall context of the supports phrase in the bill itself, the focus of which is ostensibly on limiting, rather than expanding, the scope of funding termination as a sanction for noncompliance.

Nevertheless, the bill does not specify in what respect a Federal grant to one entity could be deemed to support discrimination committed by related entities and consequently implicate the various termination requirement.

It has been stated that such a broad construction of the bill's new language was never anticipated. If, however, Congress truly intends, as some profess, to retain the "pinpoint" approach, the current language of the four statutes unambiguously requires the most modest fund termination remedy and there would appear to be no good reason to alter this formulation.

The alternate enforcement capability through litigation, which is available both to the Government and to private litigants, is also expanded by H.R. 5490. Unlike the existing statutes—where the

Federal Government's authority to proceed in court and a private litigant's jurisdiction in court, is no more extensive than its authority to proceed in fund termination proceedings.

H.R. 5490 disregards this limitation, providing broader judicial enforcement capabilities than are available administratively. If a Federal agency seeks to enforce through fund termination, it can, at most, under H.R. 5490, reach only those practices that are supported by Federal funds.

Yet, on referral of the same matter to the Department of Justice for litigation—or if a private litigant is in court by way of private right of action—the bill contemplates that all the activities of a recipient, its subunits, subdivisions, instrumentalities and transferees, are reachable by the court—even when there is no conceivable link between the violation and the federally funded activity.

Thus, the Department of Justice and private litigants can seek to enjoin activity that plainly would not be subject to fund cutoff by the funding agency.

The proliferation of lawsuits that will undoubtedly come from passage of such legislation cannot be overstated, and should prompt some consideration by Congress whether so open-ended an invitation to private attorneys general to add measurably to our already overcrowded Federal court dockets will ultimately enhance or impeded civil rights enforcement, as so expanded by H.R. 5490.

3. ADMINISTRATIVE COSTS

Nor can one overlook the serious administrative complexities that H.R. 5490 presents to the Federal agencies. The testimony last week of Dr. George Roche, president of Hillsdale College, captures the dimension of the problem with this apt description of the bill's effect.

> Schools and colleages, hospitals and clinics, agencies of State and local government, large corporations and the corner grocery store, all would be subjected to vague anti-discrimination fishing expeditions by Federal enforcement officials operating in a climate of perpetual suspicion and often without clear jurisdictional boundary even between one Federal enforcement office and the next.

Agency regulations and paperwork requirements imposed under the four existing civil rights statutes are currently onerous in many respects. H.R. 5490, which would give all funding agencies authority—indeed, the statutory responsibility—to regulate all the programs, activities, and subunits of a recipient, will remove existing boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations and impose regulatory requirements.

The result, particularly for universities and State and local governments that typically receive funding from many agencies, would likely be multiple compliance reviews as well as multiple reporting and other regulatory requirements.

Complainants could file with several agencies, resulting in duplication of effort and inefficiency in the operation of Federal civil rights enforcement. Further, because agencies would be statutorily responsible for the activities of its federally funded and unfunded components, agency expertise in the operation of programs and activities that they do fund would no longer promote the avoidance of inappropriate requirements.

There is no procedure contemplated by the bill for interagency referrals that might serve to alleviate the concern over inexpert or duplicative agency complaint investigations. Nor is it clear, even under some agency referral systems, how the fund termination provision would operate if the discriminatory activity existed in a nonfunded component, as investigated by a referral agency, and there developed a disagreement as to whether the Federal funds supported noncompliance.

No attention appears to have been given to this set of complexities by the draftsmen of H.R. 5490. The foregoing observations are intended only to highlight some of the existing difficulties with the bill as drafted. If the aim of Congress is to reshape Federal civil rights enforcement so as to assign to the Federal Government pervasive oversight responsibility in the public and private sectors with respect to discrimination on account of race, sex, age, and handicap, such a legislative undertaking should be carefully considered, fully debated, and cautiously constructed.

There is, at present, nowhere near the Federal involvement in State and local affairs that will be required under H.R. 5490. Nor can it honestly be maintained that legislation designed to overturn *Grove City* by making title IX coverage—even if expanded to include race, age, and handicap—institutionwide warrants such intrusive Federal activity.

While Congress may well conclude that such legislation is in the Nation's best interest, it should do so fully cognizant (1) that the additional cost of Federal enforcement under a bill as comprehensive as H.R. 5490 can be staggering; (2) that the current regulatory regime is inadequate to the task and will necessarily need to be revised and likely expanded; (3) that the paperwork requirements can only increase—and probably dramatically; (4) that with new legislation so dramatically different from the existing statutes invariably comes considerable litigation, leaving the law unsettled for some years; and (5) that whatever shape the Federal funding statutes might ultimately take, this body must, for constitutional purposes, define with precision what conditions it is imposing on the grant of Federal funds to States so that, as recipient States "can knowingly decide whether or not to accept those funds" as so conditioned.

It is therefore important to remove ambiguities, to tailor H.R. 5490 to its stated purpose—whether that be to overturn *Grove City* or to expand dramatically the existing civil rights enforcement mechanism—and to carefully craft the proposed bill with full attention to the complexities of the undertaking.

The Department of Justice's review of the foreseeable effects of H.R. 5490 leads us to conclude that the sweeping scope of the language proposed in the bill provides a much broader application than simple reversal of the *Grove City* decision—broader, indeed, than extending institutionwide coverage under title IX to race, age, and handicap discrimination as well.

We are concerned that the unsettling ambiguities in the bill that I have discussed have not been fully considered by these committees or adequately addressed in introductory statements of the bill's sponsors.

The perhaps unintended ramifications of the bill are certain, at best, to create confusion in recipients, agencies, and courts. At worst, they may include unwarranted interference with important State prerogatives and even lead to adverse judicial decisions as to their enforceability.

The Department of Justice stands ready to assist the Judiciary and Education and Labor Committees in formulating a bill more closely aligned with Congress' stated objective.

If the purpose is simply to overturn the *Grove City* programmatic interpretation of title IX, we would suggest that a bill more closely tailored to achieving that result is H.R. 5011, introduced by Congresswoman Schneider and cosponsored by some 141 Members of the House.

If a broader purpose is involved, such as ensuring that title IX's institutionwide coverage protects as well against race, age, and handicap discrimination, we are prepared to work with Congress to accomplish the desired end in precise, clear terms that leave no room for speculation as to the real thrust of the legislative effort.

Thank you. I will be happy to answer any questions.

Mr. **Edwards**. Thank you very much, Mr. Reynolds.

Mr. **Edwards**. The next member of the panel to testify is Harry Singleton, Assistant Secretary, Department of Education.

STATEMENT OF HARRY SINGLETON, ASSISTANT SECRETARY, DEPARTMENT OF EDUCATION

Mr. **Singleton**. Thank you, Mr. Chairman. I have no comments to make beyond those that Mr. Reynolds has made. I will be happy to answer any questions that you or members of the committee might have regarding the Education Department components of this.

Mr. **Edwards**. I am going to yield to the chairman of the Education and Labor Committee. However, I believe I would like to point out first, Mr. Reynolds, that you seem to be upset with us, with both our committees, saying that we really have not done a thorough job of hearings and so forth on this bill.

I would like to point out that we invited the Chairman of the Civil Rights Commission and he refused to come, just as the Department of Justice refused to come when we did the voting rights extension bill a couple of years ago. It is very helpful to us to have the experts come and we are very grateful that you are here today.

Mr. Perkins.

Chairman **Perkins**. Thank you, Mr. Reynolds, for your testimony.

I have sat here several years and as I view the court decision we are only striving to go back just where we were immediately before the court decision in this legislation and not get out here on the limb anywhere, as you have referred to by innuendo and so forth.

And I don't see anything wrong with the legislation. And I think the full committee will report the bill tomorrow. And we need to get it on the floor at the earliest possible date. I understand maybe the Judiciary will do likewise.

But I think you are more or less wandering around in the dark when you feel that we are going now to far-reaching effects that are not contemplated. We are simply trying to go back where we were before this court decision, and make it plain. And I think that is all we are doing.

Thank you very much, Mr. Chairman.

Mr. **Edwards**. Thank you, Mr. Perkins. The gentleman from Illionis, Mr. Erlenborn.

Mr. **Erlenborn**. Thank you, Mr. Chairman.

Let me just respond, since Mr. Reynolds didn't see fit to respond, to say to my colleague, the chairman of my committee, and to the presiding officer, that first of all, yes, we have had extensive hearings. Not too many members have attended those hearings, however. And I am not certain as to how open the minds of those who attended might be.

But we have had hearings. And my friend from Kentucky has indicated that this legislation is intended, in his understanding, to go nowhere beyond just returning us to where we thought we were before the *Grove City* decision. I think there has been ample evidence from the witnesses that have appeared before this committee to show that both in the scope of coverage and also in the method of enforcemenet this legislation does go well beyond what anyone thought existed before the *Grove City* decison.

So I think that contention, which has been repeated over and over before this committee by some proponents of the bill, is unsupportable. Could you comment on the scope of the coverage and the methods of enforcement and how closely they track what existed before the *Grove City* decision? Are they identical?

Mr. **Reynolds**. As I tried to indicate in my statement, Congressman Erlenborn, it is certainly not the case from the language that has been used in these amendments that the bill would return title IX and any of the other statutes to an institutionwide coverage which as I understand it, is what a number of Members of Congress thought the law was before *Grove City.*

What has indeed occurred with H.R. 5490 is that language has been issued that extends the statute beyond the educational aspects, beyond the institutional aspects and indeed covers any and all entities, public or private, that either receive or receive support from Federal financial assistance and indeed if a larger entity receives support from Federal financial assistance, then all of its subunits and affiliates would, by the same token, be subject to the coverage of those statutes even if they independently neither receive or receive support from Federal financial assistance.

So the language that has been used certainly does not square with the stated intent of Congress. Our concern is if indeed the intent of Congress is simply to do as Chairman Perkins suggested it was, that it would be well to take a hard look at the language that has been inserted in H.R. 5490, and to work with that so it does produce what I understand to be the intent of an institutionwide coverage rather than a programmatic coverage for title IX and perhaps even expand it so that it reaches race discrimination and age discrimination and handicapped discrimination.

I am not here today to suggest that the administration has a resistance conceptually or any other way to that effort. What I am saying is that certainly the manner in which thus far Congress has sought to go about doing that sweeps much broader and expands much wider the existing Federal civil rights statutes well beyond anything that existed up to this point and certainly well beyond the pre-*Grove City* interpretation as some have described it here.

Mr. **Erlenborn**. The broad thing of coverage is not necessarily a bad thing. I think that is a judgment for the Congress to make. It may be good or bad. It is not necessarily bad, but I think what is bad is to broaden coverage by using words that are ill-defined or undefined so that the exact scope of the coverage is not understood and it will spawn litigation to determine the scope of that coverage.

Now, I am reminded of what this Congress did some 10 or 12 years ago in expanding coverage of the Long Shore Harbor Workers Compensation Act, which has spawned numerous lawsuits since that time and has prompted the Supreme Court, several members of the Supreme Court, to state that the scope of coverage is about as unclear as could possibly be, which means nobody really knows what it is the Congress did and we have been spending a lot of money trying to find out.

I am being notified that my time is up. Let me just make this observation: That if we were to want to extend this coverage, we should do it in a way that we all understand what it is we are doing and compliance will follow, rather than resistance, because people do not believe that they are covered.

One last question, if I might, and that is, is there any reason why we must use this following of Federal funds, any constitutional reason, rather than just extending the protection of civil rights to all public and private entities without tying that to the receipt of Federal funds?

Mr. **Reynolds**. Well, the reason that these statutes are tied to Federal funds relates to an exercise by Congress of its spending power. I do believe, generally, at least with respect to the various areas that are covered by H.R. 5490, that would be an appropriate exercise of power by Congress; and the spending power does allow Congress if it extends Federal funds, to attach conditions to those funds with respect to the recipients.

I think that the concern we have principally is the ill-defined and imprecise drawing of H.R. 5490, which would be susceptible to a constuction that would allow for coverage without regard to Federal funding whatsoever of certain of the entities that presumably might be covered by this statute.

If Congress is indeed intent on doing that, our view is that rather than suggest that all they are doing is returning the law to where it was before *Grove City*, they should simply say "We intend to change the civil rights enforcement mechanism as it is today to this much broader and much more expansive approach," and then go about the business of trying to formulate carefully the kind of legislation that would answer many of the enforcement complexities that do come with this kind of legislation.

That is indeed a policy judgment for Congress to make; but if indeed Congress has made the judgment that all it is concerned with doing is changing the programmatic aspects of title IX, as *Grove City* determined them, to be institutionwide, and not only with respect to sex discrimination, but in other areas as well, this legislation as we are looking at it now, certainly is not confined to, and does not comport with that intent.

It goes far beyond it, or it is at least susceptible to an interpretation that I think goes well beyond it, as I have explained.

Mr. **Edwards**. We will be operating under the 5-minute rule. The gentleman from Michigan, Mr. Kildee.

Mr. **Kildee**. Thank you, Mr. Chairman. Mr. Reynolds, has the Department of Justice determined that it will apply the *Grove City* decision to cases involving title VI of the Civil Rights Act of 1964 and section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975?

Mr. **Reynolds**. Congressman, the Supreme Court has determined that with respect to title VI, and 504 (and I think that the Age Discrimination Act language would seem to track the other two) that that interpretation probably would be the same for both statutes. We have Supreme Court decisions that have indicated that the other statutes are indeed programmatic.

Mr. **Kildee**. So you feel, then, that they would apply not only to the title IX, but these other three acts, including the Age Discrimination Act, then?

Mr. **Reynolds**. Well, I only hesitate on the Age Discrimination Act because that is not in a statute that the Department of Justice enforces. But I can say from the time that 504 and title VI and title IX have been enacted, the courts have read and interpreted them as programmatic.

The Supreme Court has confirmed that. I cannot see anything in the body of laws that exists today and has existed since those statutes were enacted that would suggest a change in their interpretation as they currently read.

Mr. **Kildee**. So without the enactment of H.R. 5490, then, the application in all four of these acts then would be narrowed, rather than broadened.

Mr. **Reynolds**. It would be programmatic rather than institution-wide. I think one could accomplish an institutional amendment to the statutes without going about it in the broad-based way that H.R. 5490 does, a way that reaches well beyond that objective.

Mr. **Kildee**. Thank you. That is all I have, Mr. Chairman.

Mr. **Edwards**. The gentleman from Wisconsin, Mr. Gunderson.

Mr. **Gunderson**. Thank you, Mr. Chairman.

I would be interested in your comment as to the difference in the definition of recipient between H.R. 5490 and H.R. 5011. It seems to me that my recollection of H.R. 5011 is that also changes deleting the phrase "program or activity," and substituting the word "recipient." And I would be interested as to how you feel that that is not as expansive and more supportable than H.R. 5490.

Mr. **Reynolds**. H.R. 5011 uses the formulation program or activity or institution, rather than recipient. Therefore it accomplishes for title IX the stated purpose, as I understand it, of Congress following *Grove City*. It does not use the same formulation that you have in H.R. 5490.

Mr. **Gunderson**. Thank you.

Does the administration either propose or do you support any specific amendments to H.R. 5490 at this point in time, other than your general concerns in your testimony?

Mr. Reynolds. We would certainly be prepared to work with these committees and Congress on language that would better bring H.R. 5490 into line with what is the stated intent of Congress.

We do not at this point have specific language, but we certainly are prepared to work with the Congress using whatever vehicle might be deemed appropriate—H.R. 5011, H.R. 5490, or some other vehicle—in order to accomplish the purpose that Congress has articulated, and hopefully remove a number of the complexities and ambiguities and inconsistencies that I pointed out are lurking in H.R. 5490.

Mr. Gunderson. Would it be the intent of the Justice Department if H.R. 5490 were passed in its present form that you would recommend to the various departments adopting administrative rules to implement the bill that they take the expansive mentality or interpretation which you have suggested in your testimony?

Mr. Reynolds. Well, there would certainly be a need for regulatory revision and the crafting of new regulations. If Congress passed this bill, we would obviously have to undertake to ensure that the regulations were faithful to the statutory command. The kind of coverage that I have outlined today suggests some of the reach that I think would follow from passage of H.R. 5490.

Mr. Gunderson. I would be interested in pursuing this just a bit further. For example, if this bill passes in its present form, you mentioned that pharmacies, drug stores, and everyone else could be involved simply because they receive some Federal funds. Would it be the recommendation of the Justice Department to HHS that this type of an expansive interpretation of H.R. 5490 ought to occur?

Mr. Reynolds. Well, I don't know exactly how one would cover that in the regulatory sphere. It seems to me that if H.R. 5490 is passed, one of the questions that would definitely have to be considered is exactly how that coverage would work with pharmacies. What kind of Federal financial assistance either as transferees or directly or indirectly would be going to the pharmacies would have to be sorted out.

A blanket statement, I don't have, but it does seem to me there is every potential that the regulations that would follow after passage of H.R. 5490 could well sweep as broadly as I have outlined in my testimony.

Mr. Gunderson. How do you respond to the footnote in the *Grove City* case which indicated that it really was not intended to include welfare programs and those type of activities?

Mr. Reynolds. I mean the point is precisely that; that the *Grove City* decision was not dealing with coverage of a recipient as defined in this statute which includes a transferee of Federal financial assistance or includes one who has received support. We have a whole new definition that was not before the Court at the time that it wrote *Grove City* and that footnote.

I think given the new definition, it is hard to say that we are not looking at potentially the problem of the pharmacy as a transferee. I would add also that in the regulations as they now exist there is protection afforded for ultimate beneficiaries that are excluded from coverage. This definition removes that.

Now, ultimate beneficiary would be, for example, in the pharmacy situation, somebody with Medicare and Medicaid, would be the individual who had the Medicare or Medicaid assistance and used it to buy whatever drug prescriptions at the pharmacy.

Under the existing regulations, the ultimate beneficiary would certianly not be one who could then trigger the pharmacy's coverage as a transferee, because the regulations exclude it. But this new statutory definition removes that and there is no protection now for ultimate beneficiaries. That feature of the regulatory definition was not carried over into the statutory definition.

So you really have opened the way quite broadly without any kind of limitations to a very real potential that the construction I have given you as to the pharmacy situation would be the one that follows from the statute.

Mr. GUNDERSON. Thank you.

Mr. EDWARDS. The gentlewoman from California, Mrs. Burton.

Mrs. BURTON. Mr. Reynolds, what would the Department of Justice's posture be in light of the *Grove City* decision if H.R. 5490 is not enacted? And furthermore, you serve as the legal adviser to approximately 30 Federal agencies and departments which must administer the transfer of Federal dollars to public and private entities.

How have you advised them to comply with the Court's ruling in *Grove City?* For example, what advice are you going to give Mr. Singleton?

Mr. REYNOLDS. We have already discussed the matter and certainly Mr. Singleton can add to this. We have indicated and will continue to indicate that the law as it is written for title IX and indeed the other statutes we have referenced is a program specific statute; that it has been since 1964, since 1972 for title IX, since 1973 for 504 and since 1975 for age discrimination.

It has been construed by the courts as a program specific statute and that we do not see that the *Grove City* decision alters in any way the interpretation that has been placed on those statutes from the time of their enactment.

Mrs. BURTON. I have no further questions.

Mr. EDWARDS. The gentleman from California, Mr. Packard.

Mr. PACKARD. Thank you, Mr. Chairman. I have no questions.

Mr. EDWARDS. The gentleman from New York, Mr. Ackerman.

Mr. ACKERMAN. Thank you very much, Mr. Chairman.

I would like to get down to basics first, if I could. Is discrimination immoral?

Mr. REYNOLDS. I think it is immoral absolutely.

Mr. ACKERMAN. Is it illegal?

Mr. REYNOLDS. I think discrimination is illegal in most instances. There is some discrimination—any time one makes a decision, for example, with respect to individuals based on their talent—one could say that is discrimination. But I think discrimination based on immutable characteristics, tied to race, sex, national origin, handicap, or age is certainly illegal.

Mr. ACKERMAN. Should the Federal Government be helping people that are doing things that are immoral?

Mr. REYNOLDS. No, I don't think the Federal Government should be helping them.

Mr. **Ackerman**. Thank you. I would like to ask a question of Mr. Singleton.

If this committee disagrees with the Supreme Court that Pell grants and guaranteed student loans extend beyond the admissions and the financial offices, what circumstance, if any, would any institution of higher learning which admits students and enrolls students with Pell grants and GSLs, not be covered by title IX?

Can you envision any?

Mr. **Singleton**. Is that with something like H.R. 5490 in effect or without that? Are we going to continue with the program specificity decision?

Mr. **Ackerman**. No; in what you might envision with the present legislation, could you envision any way that an institution of higher learning would not be covered by title IX?

Mr. **Singleton**. No.

Mr. **Ackerman**. Thank you. I have no other questions.

Mr. **Edwards**. The gentleman from Michigan, Mr. Conyers.

Mr. **Conyers**. Thank you, Mr. Chairman.

Mr. Reynolds, we received your testimony late and I apologize for being late. I did not hear it, but we are not talking about whether we are going beyond *Grove*. You don't mind making the corrections that were intended in H.R. 5490 as long as we don't exceed the corrections that were intended. I take that to be the thrust of your testimony.

Mr. **Reynolds**. That is essentially the thrust, Congressman.

Mr. **Conyers**. And you see large adverse consequences coming if we inadvertently go beyond *Grove*.

Mr. **Reynolds**. Well, yes, I can see some very serious problems. I have tried to outline them in my statement. If Congress, through language that is not precisely defined, sets up an enforcement mechanism that has serious complications as to the ability to administer it, serious cost ramifications, serious inconsistencies with respect to the scope of coverage and the nature of the coverage, I think that we wind up in the long run with something that is counterproductive to civil rights enforcement rather than productive.

I think that those concerns are why we feel that it would be well to focus on the complexities and inconsistencies so that the legislation says what Congress intends it to say and says it precisely.

Mr. **Conyers**. Well, you won't mind letting the Congress determine itself what it intends to say and how it intends to say it, would you? After all——

Mr. **Reynolds**. Congress will determine, I assume, for itself what it intends to say and how it intends to say it in any event. What our view is is that we would like to be of some assistance to insure that if inadvertently Congress is saying something that it really doesn't intend to say, that that is pointed out so that the many complexities that come with that can be repaired before the legislation is enacted.

Mr. **Conyers**. And you would have no reservation about fully enforcing whatever it is that we intend to say as long as we understood what we were doing at the time we enacted the legislation.

Mr. **Reynolds**. That is my responsibility.

Mr. **Conyers**. Well, that is fine. Because, you know, quite frankly, we are sensitive to your cautionary remarks and we have a great number of lawyers and civil rights advocates, constitional specialists, professors, former civil rights division heads. So the record will be totally complete with every kind of suggestion, advice, caution, caveat, that will be manageable.

These hearings are clearly open to everyone in and out of the legal field, in and out of Government, to give us their best view of what is going to happen. It seems to me that you come here talking a larger step than I might have expected. I am glad to hear you are willing to be able to move to repair *Grove*.

And I will very carefully analyze your reservations and all of those others that are made. But in the meantime, right now the bulk of the testimony has made me feel rather comfortable that we are not treading into any future constitutional quicksand that will make us regret where we are going.

So I think we are almost there, Mr. Chairman. If we can assure the head of the Civil Rights Division that we won't make his work more cumbersome and that he won't be trying to explain what we thought we wanted to do, this should work out pretty well.

I think we are under pressure to move forward and I think we are moving forward rather carefully here. And in that respect, for that part of your testimony that agrees with the corrections we are making, I certainly welcome. And the part that warns us that we might be overstepping, I am going to go back and look very carefully at it with our Judiciary Committee lawyers and see if there is anything that we have to be worried about.

Mr. REYNOLDS. I appreciate it.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Conyers.

Yes; we have gone out of our way, Mr. Reynolds, to have people come in from every administration since 1964—Johnson, Nixon, Ford, Carter, and now you. And you really are standing all alone insofar as the interpretation of this bill, insofar as the codification of what we think and what they think has been the thrust of the statutes amended by H.R. 5490 and fund termination.

We asked them all that question and the answers were in the affirmative. But your answer is different. And we respect your views and we thank you very much for your testimony today.

Mr. REYNOLDS. Thank you, Mr. Chairman.

Mr. EDWARDS. The second panel and the last panel for this morning will be Professor Drew S. Days and Mr. J. Stanley Pottinger. Mr. Days was Assistant Attorney General for Civil Rights from 1977 to 1980, and Mr. Pottinger was Assistant Attorney General for Civil Rights from 1973 to 1977.

Without objection, both of the statements will be made a part of the record. Who wants to go first, Mr. Days, Mr. Pottinger?

Mr. POTTINGER. We will do it chronologically, Mr. Chairman.

Mr. EDWARDS. Mr. Pottinger, it is great to have you back here. You have testified before the Judiciary Committee on so many occasions, and you have always been very instructive and very cooperative. We are delighted to see you again.

STATEMENTS OF DREW S. DAYS III, FORMER ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS AND J. STANLEY POTTINGER, FORMER ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS.

Mr. POTTINGER. Thank you very much, Mr, Chairman. It is nice to be here again to see you and members of the panel again.

Mr. Chairman and members of the two committees, I am Stanley Pottinger, as you indicated. And I have served in the administration of Richard Nixon as Director of the Office for Civil Rights in the Department of Health, Education, and Welfare.

I noted a few moments ago that I believe except for Mr. Reynolds, that probably makes me the only previous Republican enforcer of civil rights in this capacity who has appeared before the committee.

There are times when I make the most of that and there are other times when I try not to make the most of it. But today I would like to bring before your attention the views of a previous Republican administration to this issue, at least for purposes of some of the balance that might be brought to bear on a bipartisan issue.

I am pleased to see strong bipartisan support for the legislation. Prior to this year's Supreme Court decision in *Grove City* officials of both political parties who have been responsible for administering the major antidiscrimination laws did not differ on their interpretation of the broad coverage of these statutes.

When I first came to the Office for Civil Rights, title VI of the Civil Rights Act of 1964 was the only law for which that agency was responsible. During my service in the Nixon administration, Congress enacted title IX and section 504 prohibiting, respectively, discrimination on grounds of sex and handicap.

And we took a prideful and I think helpful role in seeing that those laws were passed. Since both of those statutes were patterned after title VI, the administration interpreted them in the same manner as title VI. Both the Department of Justice and HEW interpreted section 601 broadly to prohibit discrimination based on race and national origin in school districts and colleges which received any kind of Federal financial assistance.

This meant that the Office for Civil Rights had jurisdiction to investigate a complaint anywhere inside the institution. There was no requirement to make a prior finding that the alleged discrimination occurred in a program or activity receiving Federal funds and indeed the Department would have been unable to do that. It would have placed excessive and unnecessary burdens on school systems and colleges to report to Federal agencies every activity supported by Federal funds, just in case the Government would some day have to make such a finding.

It may be appropriate at a later time in question and answer to talk about this a little further, because I think there is a fairly deep misunderstanding about the nature of the administrative burdens that allegedly would be imposed by this new legislation.

The Nixon administration's interpretation of the reach of section 601 was grounded in the legislative history of title VI and was reinforced by case law. In the late 1960's and early 1970's, the principal title VI litigation was in the area of school desegregation. There was no question that title VI required elimination of all vestiges of de jure racial discrimination in the school system, including a athletics and extracurricular activities which received no Federal money.

And there is ample case law one can establish in support of that proposition. But imagine, if you will, the ludicrous result that would have occurred if section 601 were interpreted to apply only to each discrete program or activity receiving Federal assistance, each individual program in an institution.

The law would have been permitted racially segregated pockets within an otherwise desegregated school system. White and black children would have sat next to each other in class, but would have been required or could have been required to attend segregated afterschool activities, athletic activities. They could have been required, for instance, to ride segregated buses.

Prior to the educational amendments of 1972, approximately 90 percent of Federal aid to higher education was categorical money, primarily for research and development. No one in the Nixon administration ever suggested that title VI applied to just to the physics laboratory of a major university or to some other individual program of the unversity and not to the admissions program.

With respect to section 602, the enforcement authority, HEW could initiate adminstrative hearings leading to fund termination or it could refer the matter to the Department of Justice, where eventually I ended up prior to Drew. The enforcement stage occurred only over lengthy and exhaustive efforts to secure voluntary compliance and that I assume is a process that would continue.

If the administrative enforcement route was pursued it was understood that section 602 had more limited scope than section 601. During the administrative hearing, facts were obtained on the source and amendments of Federal aid and if the matter went as far as actual termination of funds, funds to be cut off applied only to the particular program or part of the recipients activity as to which there had been an express finding of noncompliance.

In other words, the nexus between the discrimination and the fund termination would be made through a hearing process. The seminal case interpreting section 602 is *Board of Public Instruction of Taylor County* v. *Finch*, which was decided by the fifth circuit in 1969, the year before I became Director of the Office for Civil Rights.

The teaching of that case made clear that section 601 covered the entire school district, but under section 602 the enforcement provision HEW could not terminate Federal funds for the adult education program because there was no finding of a violation in that activity, but HEW could cut off funds to elementary and secondary schools where a violation was found.

In other words, Mr. Chairman, there is an existing body not only of administrative law and administrative practice but of court interpretation behind that that circumscribes the fears that have been voiced about an extended or overexpanded impact on the enforcement side.

I have dwelt so far on my experience with title 6 at HEW. When I later became an Assistant Attorney General for the Civil Rights

Division, the Attorney General issued proposed regulations called the coordination of enforcement of nondiscrimination in federally assisted programs, pursuant to an Executive Order known as 11764.

The primary purpose of those regulations was to insure coordination of title VI enforcement throughout the executive branch and not to narrow or expand either one, the jurisdiction of enforcement agencies over recipients of Federal funds. I am convinced that the *Grove City* decision significantly does narrow the interpretation of title IX and by implication, title VI and their coverage as I and others in both the Nixon and the Ford administration when I later was Assistant Attorney General, understood it and applied it.

I believe the Congress should now make clear that we all—what we all thought had been made clear in 1964, again in 1972, again in 1973, and through subsequent years by the consistent administrative and law enforcement practice. And I would hope that the Congress would expeditiously move to enact H.R. 5490 and S. 2568. Thank you, Mr. Chairman.

If you want questions now or after Drew has spoken, I will be happy to cooperate.

Mr. EDWARDS. Thank you. I believe we will hold questions until we hear from Mr. Drew Days III, who was Assistant Attorney General for Civil Rights from 1977 to 1980. It is a real privilege to have you here again, Mr. Days.

Mr. DAYS. Thank you, Mr. Edwards. It is a pleasure to be here. I want to thank the Committees on the Judiciary and Education and Labor for offering me the opportunity to testify today in favor of H.R. 5490, the Civil Rights Act of 1984. I think that it is a sound and much needed legislative proposal to ensure that the four major Federal laws prohibiting discrimination by fund recipients, title VI, title IX, section 504, and the Age Discrimination Act, continue to be viable and effective tools in protecting the rights of racial and ethnic minorities, women, the disabled, and the elderly.

I speak to you as one with a rather extensive background as a civil rights litigator, both as a staff lawyer at the NAACP Legal Defense and Educational Fund, Inc., and as Assistant Attorney General in the Carter administration. As a law professor for the past 3 years, my teaching and scholarly pursuits have focused on questions of civil rights and civil liberties.

My personal experiences and my study of the history of congressional efforts to end various forms of discrimination in America since 1964 have led me to conclude that the overall objective was to make certain, in the area of Federal funding, that taxpayers' dollars were not used to initiate or perpetuate the very forms of bias and prejudice that other substantive statutes addressed more directly.

Federal funds should not be allowed, under title VI of the Civil Rights Act of 1964, to go to school districts being sued by the Attorney General under title IV of that same act for operating segregated facilities. Educational institutions should not be allowed to discriminate against women employees under title IX in ways that directly violate title VII of the Civil Rights Act of 1964.

I am aware that these observations are not original or startling. They go to the very heart of the Federal Government's duty, as

Congress correctly saw it, to prohibit, and to remedy where practiced, both simple-minded and sophisticated techniques for continuing discriminatory practices while feeding from the public trough. But sometimes truisms bear repeating.

Memories tend to grow dim with the passage of time and principles that seems so clear and right when they were first pronounced often get lost in a flurry of debate over hypothetical horrors that most of my law school colleagues, who thrive on hypotheticals, would find too farfetched to merit presenting for class discussion. The simple justice of requiring recipients of Federal funds to treat all persons fairly should not be lost sight of as the central question.

I cannot stress enough the importance of the four statutes addressed by H.R. 5490 to the civil rights enforcement effort. In the case of title VI, hundreds of school districts were effectively desegregated because of vigorous administrative action, either self-initiated, as in the Johnson administration, or court directed, as was true in many instances thereafter.

And title IX has forced American education to address directly the often subtle, but deadly, ways in which females have been deprived of an equal opportunity to realize their full potential to learn in the classroom, compete on the athletic field, and assume positions of responsibility in the larger society.

The significance of section 504 deserves special note. Since title VII of the 1964 Civil Rights Act does not prohibit discrimination in employment on the basis of handicap, the disabled must look principally to section 504 to obtain any meaningful relief against exclusionary practices in this area. While the Age Discrimination Act has not been the subject yet of much enforcement activity, to my knowledge, there is no reason to believe that its potential impact will not be equally significant, particularly for older Americans.

As a general matter, finally, nothing restores the dignity of victims of discrimination, whether they sue for themselves or rely upon Government representation, more than to know that their hard-earned dollars are no longer being used to support such reprehensible and damaging practices.

Let me turn now to the question of how these statutes have traditionally be enforced. I think my description will serve to reassure you that H.R. 5490's effect will be to ratify and reauthorize practices of many years standing which the Supreme Court's recent decision in *Grove City College* v. *Bell* improperly curtailed. To take the example of a school district, one that Stan Pottinger just mentioned—if Federal funds were being provided to support the general educational program or to benefit children in the system in other ways, it was my position as assistant attorney general for civil rights that the recipient district was covered by title VI such that racial segregation of children was prohibited throughout the system as a whole.

Where there appeared to be a nexus between activity not directly funded and directly funded activity, full coverage also was regarded as consistent with title VI. Consequently, even though Federal funds were designed to benefit children and not to support teachers' salaries, racial discrimination, or segregation with respect to teachers was regarded as prohibited activity.

The guiding principle in such instances was simple to identify, it seemed to me: Could Congress conceivably have intended that children who were entitled under the Constitution to attend school in a desgregated system, nevertheless must suffer in silence segregation of teachers so long as the students themselves were not discriminated against directly and no Federal funds were supporting the teacher assignment practices?

The answer that Congress could not have struck me as both obvious and correct, given the history I mentioned earlier. Similar examples could be cited under title IX and section 504. The question in those cases was essentially the same: Was it Congress' intent to allow taxpayers' dollars to go to a recipient who, while committing itself to act nondiscriminatorily, nevertheless continues to harm the very persons Congress ought to protect in the very ways that Congress sought to prevent?

In other instances, not uncommon, there appeared on the face of things to be only a remote connection, if any, between the target of Federal funding and the claimed discrimination. Our response was to decline to take any enforcement action. And in those cases where we, as government officials, and Federal funding recipients disagreed over the degree to which there was any nexus between funding and alleged discrimination, the recipients were free to argue their position both in the administrative process and in the courts.

Moreover, as Assistant Attorney General for Civil Rights, it was my responsibility to advise executive branch agencies of their administrative authority under the relevant statutes and to recommend, from time to time, whether agency enforcement or referral to the Justice Department for litigation would be more effective in carrying out the legislative purpose.

In every case where I felt that novel or legally complex coverage issues were raised, it was my recommendations that the matter be referred for litigation in order to ensure that subsequent administrative action was guided by the decision of an article III Federal court, rather than that of an administrative law judge.

The approach we followed, one we inherited from our Republican predecessors I inherited from Stan Pottinger, and they from prior administrations, was dictated first and foremost by common sense. Of course one can read title VI, title IX, section 504, and the Age Discrimination Act, as they presently stand, in a fashion that would support major expansion of Federal enforcement authority.

It is a risk, I assume, every Congress faces in enacting laws that must be enforced over time by a series of administrations with differing views in this regard. But the truth is that no prior administrations have abused congressional trust or intent in carrying out enforcement activities under these statutes by expanding unduly their scope or terms.

Indeed, the problem is quite otherwise: A current administration that wants to read these statutes, contrary to the long line of judicial precedent for the proposition that civil rights laws ought to be liberally construed to ensure that their broad objectives are achieved, in a manner that hobbles their effectiveness.

Whereas prior administrative enforcement has been characterized by a commonsense approach, the Reagan administration excepted, the Supreme Court's recent decision in *Grove City College* is anything but commonsensical. Based upon a tortured reading of legislative history, the Court reaches the conclusion that a recipient can take Federal money, provided by way of student financial assistance, use it to support sex discrimination in college activities not directly related to the operation of its financial aid office and not be subject to title IX, Congress' major effort to rid American education of such practices.

It seems to follow, moreover, since title IX is patterned after title VI, that the same college could practice racial segregation outside of its financial aid operation and risk no sanctions under that latter statute. The same goes, one would assume, for section 504, also structured like title VI, and the Age Discrimination Act. This is a result that it seems to me flies in the face of the last 30 years of congressional efforts to combat discrimination by those who thrive on Federal funds.

It is a reading of the law that denigrates the historic work of Emmanuel Cellar and Hubert Humphrey, whose vision in promoting the passage of title VI pointed the way for later leaders in the Congress to address forcefully the shameful treatment of women, the handicapped, and the aged by recipients of Federal moneys.

But our system of government provides us with a mechanism to set things right again when the Court misreads the legislative intent of the Congress: Congress can amend the law to make its will unmistakable. That is what I understand H.R. 5490 to be about. It restores to the executive branch the power to enforce title VI, title IX, section 504, and the Age Discrimination Act in the responsible, common sense way that had been the case up to the *Grove City College* decision. It makes no further changes in the scope of terms of these statutes. It should be enacted. Its corrective action is critically needed.

Thank you very much.

Mr. EDWARDS. Thank you very much, Mr. Days.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I welcome our two civil rights leaders from the past back here again. They are looking hale and hearty.

Mr. DAYS. There is a relation, Mr. Congressman.

Mr. CONYERS. Undiminished, even though they have been taken out of the rigors of Government activity, they are still thriving. And I am very delighted to see both of them at the table.

I think, Mr. Days, you put your finger on the point that I want to make sure this record is replete, and that is that the enactment of the measure before us would not make changes in the scope of the statutes, but still it might allow the courts to make an expansion of the law if they choose.

And it could be on this point that Mr. Reynolds was deeply troubled. Maybe he thought that that would confuse the courts, or maybe that they would not be able to move appropriately.

And just for the record, I would like you to expand on that possibility and that issue that you have raised in your testimony.

Mr. DAYS. Well, Mr. Conyers, it is a pleasure to see you again. Essentially, as I understand the bill, the drafters have attempted to draw from legislative history of these accounts, from the administrative enforcement practices, to develop a statute that uses new language, that is new to these particular statutes, but recognizable language, language that has a history behind it.

Therefore, there is a reference for these particular terms. I don't understand them to have been drawn out of the air.

The definition of recipient, the language of support, which I understand comes from the *Taylor County* decision. But as I also understand these statutes, it was Congress' determination to leave certain definitions to the courts to deal with.

The term "discrimination" has, as I understand it, been viewed as one that allows the courts, given their growing understanding of how many different forms discrimination can take, to pour in those understandings into these statutes, to make certain that the congressional objective is always satisfied.

And, therefore, the courts are not limited in what they do. But insofar as the administrative enforcement practices are concerned, it seems to me that this statute provides as much guidance as Congress normally provides to the executive branch.

There seems to be nothing novel in this approach to my way of thinking.

Mr. CONYERS. Would you care to add or give us your view of that question, Mr. Pottinger, if there is something you would want to put in on it?

Mr. POTTINGER. Well, only to underline what he has said. I think that the example of the so-called interstitial legislation that the courts undertaking through more precise definition is precisely what has given great strength and clarity to a term like discrimination.

Granted to the extent that anyone knows from experience and common sense how to define a provision, especially to exclude foreseeable improper definitions, then the Congress presumably will do that.

But the notion that one has to positively define any particular term of art in congressional session or through legislative history is virtually impossible.

I think it has to be done against the backdrop of court and legislative history, and that there is such an ample amount of it in this case that it boggles the mind in effect.

I mean there is more here than I have seen in any other legislation.

Mr. CONYERS. We are in luck here. Twenty years ago from title VI we have got an abundance of definitions, explanations, clarifying law and language.

Is it accurate to say that there has been a programmatic interpretation of some of these statutes rather than institution wide from their beginning?

Mr. DAYS. Well, I think there is a semantic problem here. My understanding of the administrative process, both before I got to Washington, during my time here as well, was that agencies started with a fairly broad sense of coverage. That is if a college were receiving Federal funds, the assumptions would be that that entire institution was open to investigation to determine allegations of discrimination.

But that it was a very fact-specific process—ultimately, the agency had to home in on where the funds were going and to what extent they supported just a limited activity as opposed to funding the entire institution.

But my recollection is that the coverage issue was usually not a big hurdle, because most institutions that were subject to complaints or investigation received Federal funds from all kinds of sources—there were in many cases millions of dollars going to a particular recipient.

But I think what is instructive about the way the courts responded to this question of program was they did not try on their own in the absence of a factual record to determine what a program was.

They left open to the agency process in the development of a factual record what a program was. So, for example, in the *North Haven* case having to do with title IX, the Supreme Court did not reach out to tell the Department of Education what the covered program was that might reach employment discrimination.

It left that to agency development. And in the recent *Darrone* case under section 504, again, the Supreme Court did not reach out to define in the absence of a record what the program there was.

It simply assumed that under normal practices there would be an investigation and an ultimate determination of how the Federal funds were funneled into the institution and distributed. What is unique about *Grove City* is that the Supreme Court does reach out to define what is a program in a very limited way on no factual basis whatsoever.

I think Justice Stevens' response to Justice White's opinion is, why are you doing this, there is no factual record here, and why do you assume in the abstract that the entire institution cannot be covered for enforcement purposes?

I think the error of the *Grove City* decision is precisely that, that it makes assumptions that are contrary to the normal administrative processes, and to the way that the Supreme Court and other courts have operated over the years.

Mr. CONYERS. There are some that think that if we try to really enforce *Grove* on its face, we would be faced with a rather chaotic situation. Do you think that that would be a result?

Mr. DAYS. As it now stands?

Mr. CONYERS. With *Grove.*

Mr. DAYS. Absolutely. Absolutely. I think it has far-reaching implications, that if not dealt with now may down the road just make a shambles, contrary to my successor's testimony, of what presently exists of civil rights enforcement.

Mr. CONYERS. Just for the record, because it was made during the Civil Rights Assistant Attorney General's statement, do you have any doubt that medicare and medicaid constitute Federal assistance which triggers coverage of the anti-discrimination laws?

Mr. DAYS. Well, I would say that as an initial matter, yes, that is the case. But I would also fall back on the process that I described, namely, one of trying to determine exactly where these funds go, and how they are used, and what impact that would have on the termination process or some other action, such as Justice Department litigation.

But I think the *Grove City* decision provides some way of looking at these funding programs—that is, grants to or awards of money to individuals that ultimately go to other entities. One has to look at exactly how the money is funneled and what type of discrimination is being practiced, that gets at purposes of the particular program.

That is, does it frustrate the congressional purpose by viewing this type of funding as not subject to the enforcement practices of the responsible agency. But the short answer is yes.

Mr. **Conyers**. Well, thank you very much. I appreciate your testimony. It is good to see you still in the struggle and following our work as closely as ever.

Mr. **Edwards**. The gentleman from California, Mr. Packard.

Mr. **Packard**. Thank you, Mr. Chairman.

Mr. Pottinger, if an institution has received no Federal assistance directly, but students are receiving student assistance, would it not harm the very people the student loan assistance program is trying to assist, those that are poor and handicapped, to have equal access to higher education, would it not be doing more harm to them, using them as the vehicle through which to get at the institution, and wouldn't it, therefore, have residual effects upon preventing equal access to a certain segment of those that would like to attend the institution?

Mr. **Pottinger**. The logic of the termination procedures definitely dictates that conclusion. But the practice does not. It is a sensitive question, and a good question, and an important one to have on the record here, because it is a question that was debated very, very extensively in 1964 when title VI itself was in debate.

At that time I believe that both Attorney General Kennedy and Senator Humphrey had a colloquy in which they pointed out that the fund termination process was potentially a bittersweet process, and they feared that the very result that you have talked about may have arisen or might have arisen under title VI.

In fact, that has not happened, for a couple of reasons. The first is that this particular process has, as Drew Days has pointed out very nicely in his testimony, the rifle shot capability of litigated enforcement, the capability of specific performance or injunctive relief does no damage to anyone, but on the contrary corrects the discriminatory condition that prompted the action.

But secondly, even to the extent that the Department of Education or whatever administrative office has jurisdiction over this lawsuit to go through the entire enforcement process, it has been the experience of virtually 20 years since title VI was passed in 1984 that the termination process leads to compliance, leads to conciliation, and leads not to fund termination, to the detriment of innocent students, but rather to the correction of the problem.

If there hadn't been that backdrop of 20 years' experience that shows it not to be damaging, I would think that there would be required a much more extensive concern or debate about the termination process. But it simply for two decades has not been so.

In fact, it has not been so to the point that most civil rights advocates think it should be—there should be more termination and more enforcement that leads to the bringing of termination than there has been in 20 years.

Mr. PACKARD. Both of you gentlemen have been deeply involved in regulatory activities in regard to civil rights, in the whole civil rights field. Thirty-seven words of title IX have resulted in page after page after page of regulation.

I don't know how many pages. But it must be many. Do you feel that H.R. 5490 would result in considerable more regulation and at the same time do you feel that it would also result in a series of new litigation that followed the original act in terms of trying to sift out what it is trying to say and how it is to be implemented and how it is to be regulated. Mr. Pottinger first.

Mr. POTTINGER. No. I don't think that there will be significant new regulatory burdens, nor do I think there will be a greater quantity of litigation. There will be a different quality of litigation over some new issues. But certainly not a quantity that should make anyone who is concerned about unwarranted government intrusion protest this particular bill.

The reason I say that with some certitude is that again there has been such a backdrop of experience with legislation upon which this proposed bill is modeled, and with administrative enforcement over a period of 20 years, that just as we have court interpretations that give meaning, fortunately, and legislative history that gives meaning to this proposed bill, I think we also have administrative practices that would indicate where it goes.

I happen to feel that it is not an unfair question to try to balance the level of intrusion and burden on the one hand against the benefits that will hopefully arise from a civil rights bill of this kind.

I think that that is a completely fair question to ask. And everyone should ask it. In this particular case, it seems to me to be relatively easy to answer, because the benefits in my view so greatly outweigh the potential burdens because of this previous experience that we have had with it.

And I might also add, if I may, one partisan note, because sometimes these bills tend to break down along partisan lines. That I cannot think of anything that ought to be more red, white and blue, five- star Republican issue than getting out in front of and in front on an issue like this that recognizes that in a free market place what is unique about our vitality as a country, our economy and our culture, is to give people the chance to do their utmost, to use their skills and talents to the utmost.

We above all ought to be saying that that is the starting line that we want to bring everyone to. And if it means eliminating handicaps in that respect that are based on irrelevant qualities, such as race or sex or national origin, then we above all ought to be out there pushing hard for that, and saying that that is what gives us the vitality, and if there is a counterbalancing or countervailing consideration that says it is just too risky, fine, then we will take another look.

In this case, I think the risks that would outweigh that benefit are so far behind us, are so small, that it should be a clear choice in favor of the bill.

Mr. PACKARD. Mr. Days.

Mr. DAYS. Yes. I agree with Mr. Pottinger on this. There will undoubtedly be new regulation and new litigation. But I think for the first time when this legislation becomes law, there will be a coherence that is presently lacking in the way in which administrative agencies and the courts look at these statutes.

If one looks at the current regulations and looks at the court decisions, it is often a process of reading tea leaves, trying to figure out whether Congress meant in title IX what it meant in title VI, or title IX and 504 directed toward the same ends.

I think when Congress speaks with one voice on these four statutes, that should dispense with a lot of the fine tuning that the agencies and the courts felt they had to engage in to harmonize these statutes.

The harmony will be there on the record, because the Congress has spoken for the first time to all of these statutes at once. And I think that is going to be a boon for civil rights enforcement.

Mr. **Packard**. Thank you very much.

Thank you, Mr. Chairman.

Mr. **Conyers**. Mr. Chairman, this is a "for the record" type question. There are more than 100 funding statutes that are not mentioned in the measure before us. What effect will this have on those laws?

Mr. **Days**. My reaction would be that as a matter of strict construction there would be no direct impact. But I think that the courts certainly and perhaps administrative agencies looking at what Congress has done with respect to these statutes would receive some guidance, would have to work based upon what they understood to be the overall objective of the Congress.

But that would not be binding insofar as Congress has not spoken to these other statutes.

Mr. **Pottinger**. I turned to my professor to get an answer, and suggested that I didn't see any. And he gave a more eloquent response.

But I think I see none.

Mr. **Conyers**. Well, I want to thank both of you. It is very important that our record have some pre-*Grove* Department of Justice people here who were there when we were crafting these earlier statutes, like title VI, two decades ago.

A lot of law and a lot of interpretation has rolled down the pike. And although the problem is still with us, we still have come quite a ways, and I think we here fondly remember the work that both of you did as the heads of the Civil Rights Division.

I am very pleased with your testimony and, again, glad to see you.

Mr. **Days**. Thank you.

Mr. **Pottinger**. Thank you.

Mr. **Edwards**. Mr. Packard.

Mr. **Packard**. Mr. Chairman, if you would permit me to ask one more question. I don't think any of us are looking for ways to subvert the civil rights efforts. I think it is a fair statement to indicate that all would like—and it is truly a bipartisan issue—all would like to bring about those laws and the interpretation of those laws that would provide the most fundamental rights of people in terms of their civil rights.

To help in that effort, let me ask one further question. Is intent an issue in the whole determination of an institution and its efforts in trying to comply, or is the affect that is taken into consideration in terms of interpretation of the law and interpretation of the act itself?

If an institution, for example, has in applying standardized tests, for example, that would have no intent in discriminating, but in its effect there is a preponderance of—the results of those tests moving from one side of a discrimination issue to another—sex, race, or whatever—and, let's use race as an illustration—if a certain body of students of one race do not achieve to the level of another race, is the effect the issue or is intent brought into the picture in terms of having an effect upon the outcome of an institution.

Mr. Days, maybe we can ask you.

Mr. DAYS. Well, I think that, first of all, I don't understand this legislation to address that issue or try to resolve it.

Mr. PACKARD. Should it then?

Mr. DAYS. It is an issue much debated in the courts and I assume in the administrative process as well. There was a time when the thinking was that title VI, for example, included an effects test. The courts are still out on that.

I think that what agencies have to do is to operate as best they can in the context of a very uncertain legal situation. The Supreme Court came down, for example, in the *Guardian's* case with respect to title VI and intent in the employment context.

I defy anybody to read the various opinions and come away with a very clear understanding of how this issue ought to be resolved. And I just think that if Congress wants to address that issue, it ought to set out that fact forthrightly and deal with it. But I don't think that that is a response to *Grove City*. I don't see that it needs to be done right now.

The courts are working it out, and one would hope that shortly it will be clarified, and given that clarification, the agency can go forward with their enforcement responsibilities.

Mr. PACKARD. Thank you.

Mr. EDWARDS. Well, the Department of Justice disagrees with you and your testimony, as you know.

Mr. DAYS. I wouldn't be here if they didn't.

Mr. EDWARDS. I presume, and I cannot guess what the opinion of the Department of Education is, because we invited the Secretary and the Secretary didn't come.

Mr. DAYS. Mr. Chairman, I haven't been following the developments very closely here. But I do understand that the Department of Education has closed down several investigations subsequent to the *Grove City* decision, and that would just seem to me to refute the testimony of my successor that the situation was the same both before and after *Grove City*.

If so, why are things being closed down that were initiated prior to the *Grove City* decision coming down? I don't know that to be factually accurate. But it is something that I have been told about.

Mr. EDWARDS. We have had witnesses that testified that there has been a change in attitude and that cases have been closed down as a result of *Grove City*. And I guess we can only assume that the Department of Education agrees with the Department of Justice on this issue.

I just really have one question for either one of you.

Mr. Reynolds said that the circuit court, with the exception of the third circuit, all agree with their interpretation.

Mr. **Days**. That is just not true. As I said earlier, the courts have looked to the question of program as one to be factually determined, not something that is addressed in the abstract. And in the *Taylor County* case, it seems to me the case that the Department relies upon, what HEW was told to do was go back and develop a factual record to show if there existed the interrelationship between Federal funding and the programs that were being targeted for termination. And I think that is really what the courts have done.

Mr. **Edwards**. Thank you very much. We are really very pleased with your testimony. We are grateful. The committee will meet again this afternoon at 1 p.m. where we have a very distinguished panel.

[Whereupon, at 11:25 a.m. the committee recessed, to reconvene at 1 p.m., the same day.]

AFTERNOON SESSION

Chairman **Perkins** [presiding]. The hearing will reconvene.

Go ahead, Mr. Fretz. As I understand, you are representing the National Senior Citizens Law Center here in Washington. Without objection, all your prepared statements will be inserted in the record.

Proceed in any manner you prefer. Go right ahead.

STATEMENT OF BURTON FRETZ, NATIONAL SENIOR CITIZENS LAW CENTER, WASHINGTON, DC

Mr. **Fretz**. Thank you, Mr. Chairman, and members of the committee for inviting me to testify on H.R. 5409.

I am executive director of the National Senior Citizens Law Center located here in Washington DC, and with offices in Los Angeles, CA. And I am prepared to address remarks to that portion of the bill before the committees that would amend the Age Discrimination Act of 1975.

As an organization which is dedicated to service toward and advocacy toward and on behalf of the low income and disenfranchised elderly, we commend the committees for considering this legislation. It is something that is well conceived and necessary.

I might add, Mr. Chairman, an observation that I think this country's awareness of the need to eliminate the vestiges of discrimination based on age and unfair stereotypes that derive from impressions about age has been somewhat slow to develop.

The myths and disenfranchisement of older people, and arbitrary treatment of them, continue in areas of employment, of credit, training, of education in many age segregated services. For this reason, anything the committees can do which will help to strengthen both coverage and enforcement of the Age Discrimination Act would be very welcome indeed to older persons who are protected under the act.

According to a very extensive survey made several years back by the U.S. Commission on Civil Rights, discrimination based on age does continue to arise among recipients of Federal financial assistance. The Commission has documented any number of instances and programs and identified recipients where that continues to exist.

According to Commission findings, an analysis of participation in federally assisted community mental health centers showed that older persons accounted for 10 percent of the service area population but, in fact, received about 4 percent of the services, which is quite a disproportionately low level of participation.

Similarly, the Commission found, Mr. Chairman, that age discrimination has tended to persist in areas of training, vocational rehabilitation, adult education, largely because of age stereotypes in which the recipients who provide the training think they can get a bigger bang for the buck by training younger persons, when, in fact, persons who are at age 35 or middle age who desparately need training or retraining even today do not receive at least their fair opportunity to receive such training because of those stereotypes which persist.

We believe that the Age Discrimination Act does offer real potential to older Americans to alleviate the kind of age weighted considerations that still tend to work against them. And for this reason, we commend the committee's consideration of this bill.

As we understand it, the bill will attend to the phrase "program or activity", which is the operative phrase for coverage under the Age Discrimination Act as for the other civil rights statutes which the committee is considering.

The Age Discrimination Act phrase, "program or activity," of course, is borrowed from a like phrase and concept under title VI of the Civil Rights Act of 1964. As we understand it, the pending legislation would replace the somewhat narrow reading given the phrase "program or activity" by the Supreme Court in the *Grove City College* decision and replace it with coverage of a recipient.

The bill, of course, repiaces the phrase "program or activity" with the phrase or word recipient at appropriate places. The bill goes on to define recipient in a manner consistent with the definition of recipient in the agency regulations which interpret the age discrimination act today.

An equally important reason for the committee's consideration of this bill, we believe, is that it will encourage the Federal Government and Federal agencies to pursue enforcement of the age discrimination act in a more aggressive manner in the future than many agencies have done in the past.

My prepared statement, Mr. Chairman, goes a bit further into the not terribly happy history of nonenforcement of the age discrimination act by Federal deputies and agencies, and I won't take up the committee's time to review that.

I would simply note that this bill would be quite helpful in encouraging Federal departments and agencies to take a somewhat more considered stance and a more energetic position with respect to enforcement of this act which continues to hold a great deal of potential for persons protected under it.

That concludes my verbal remarks, Mr. Chairman.

Mr. EDWARDS. All right. Thank you very much, Mr. Fretz. You have been very helpful.

[Prepared statement of Burton D. Fretz follows:]

PREPARED STATEMENT OF BURTON D. FRETZ, EXECUTIVE DIRECTOR, THE NATIONAL SENIOR CITIZENS LAW CENTER, INC.

Mr. Chairman, and Members of the Committees: Thank you for inviting me to testify on H.R. 5490, a bill to address the decision of the United States Supreme Court in *Grover City College* v. *Bell*, 79 L.ED 2d 516 (1984). As a nation-wide organization dedicated to advocacy and support for low-income and disenfranchised older persons, the Law Center believes this legislation is well-considered and necessary.

This country's awareness of the need to eliminate discrimination based on unfair impressions and stereotypes about older people has been slow to develop. Myths about aging continue to bring arbitrary consequences to older persons in areas of employment, credit, and a variety of age-segregated services. National sensitivity to discrimination based on age is a relatively late arrival to civil rights.

According to the United States Commission on Civil Rights, discrimination arises from the policies and procedures of Federal agencies, State legislatures and executive departments, and public and private agencies administering federally-assisted programs. Affected age groups vary by program, and in some instances by State and locality. Generally, however, the older an individual, the more likely he or she will be the victim of age discrimination. Persons aged 65 or over are the most frequently affected age group.

The federal government has fashioned two statutory responses to the problem of age discrimination: The first is the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. The statute prevents unreasonable forms of discrimination relating to hiring, promotion, demotion and termination and other attributes of employment and, with certain exceptions, protects individuals between the ages of 40 and 70.

The second response is the Age Discrimination Act of 1975, 42 U.S.C. §6101 et seq. (ADA) which prohibits discrimination on the basis of age in the delivery of services and benefits by recipients of federal financial assistance. The ADA does not apply to employment practices, 42 U.S.C. §6104(c), but covers discrimination affecting persons of all ages without limitation. Some exceptions permit age distinctions and reasonable factors other than age in designated circumstances. 42 U.S.C. §6103(b).

The ADA offers real future potential to clients and their representatives in combating vestiges of age discrimination in our society. The Act may be used, e.g., to challenge unfair credit practices which are linked to some form of federal support or regulation, such as loans through a Federal Credit Union, Federal Housing Administration or Veterans Administration. It can be used to assure that older persons enjoy equal access to educational and training programs. The Act can be the basis for equal access among older people to obtain medical and clinical services in federally-supported health programs.

Coverage under the Age Discrimination Act turns on the phrase "program or activity," the same phrase which defines coverage under Title IX of the Education Amendments of 1972 at issue in the *Grove City College* case. Both statutes borrowed the phrase and the coverage concept from Title VI of the Civil Rights Act of 1964.

The pending legislation would replace the narrow reading given the phrase "program or activity" by the Supreme Court in *Grove City College* and replace it with coverage of a "recipient." In so doing, Congress properly confirms the scope of coverage intended under Title VI, as well as other statutes like the Age Discrimination Act. The Age Discrimination Act has been intended to apply in scope equivalent to that of Title VI. The ADA, along with the other civil rights statutes based on Title VI, properly are amended together to maintain this principle of uniform coverage.

An equally important reason for this bill is for Congress to encourage the federal government to pursue ADA enforcement much more aggressively than in the past. Despite its great potential the ADA may be among the least enforced civil rights statutes in the United States Code. The ADA is heavily dependent on the issuance of regulations by federal agencies in order to effectuate its purposes, but this mandate largely has gone unheeded.

Protections in the ADA are not entirely self-executing. The Act requires promulgation of two different sets of regulations to implement the statutory protections. The first set constitutes regulations generally applicable to programs administered by all federal agencies ("government-wide regulations") and are to be promulgated by the Secretary of Health and Human Services (HHS). 42 U.S.C. §6103(a). The Secretary promulgated final government-wide regulations effective July 1, 1979. 45 C.F.R. Part 90.

A second set of regulations must be promulgated under the ADA by the head of each federal department or agency that extends federal financial assistance to any program or activity ("agency-specific regulations"). These must be approved by the Secretary of HHS, as the general overseer of ADA enforcement, prior to final adoption. 42 U.S.C. § 6103(a)(4). The Secretary has not approved any of the proposed ADA regulations that have been submitted.

As a result, 24 out of the 28 federal agencies have not published final regulations implementing the ADA—six years after the passage of the statutory requirement. A total of 22 departments and agencies have failed to notify recipients of federal financial assistance of their obligations under the Act. Eighteen agencies did not bother to train staff about the ADA during the last reporting year.

Despite the somnolent activity by federal agencies under the ADA today the need for federal process under the Act is apparent. A total of 133 age discrimination complaints were filed with federal agencies in 1983, even though these agencies had not adopted these regulations or a system to process such complaints. In the absence of an agency process, the cases were referred to the Federal Mediation and Conciliation Service, which lacked the power to make binding determinations based on the complaint. About half the complaints involved denials of admission to schools and training programs. Ten complaints involved denials of health services. Ten more involved denials of federally supported housing.

Nevertheless, we can expect future progress despite this slow start. If it has not been clear before, it will be clear with this legislation, that the remedy for a violation of the Age Discrimination Act involves the same broad coverage as the remedy for violation of similar civil rights statutes governing federal financial assistance. A federally-funded adult education class which restricts students to those under 30 will be answerable for that practice whether or not the federal funds are traced to that particular class. A health center which effectively excludes older persons from its services will be responsible for its policy regardless of which equipment has been purchased with federal funds or which staff is paid with federal dollars.

This clarification is consistent with the remedial purposes of the Age Discrimination Act and with the effect of this bill on related civil rights statutes.

Mr. EDWARDS. We will hear now from Marcia D. Greenberger, representing the Women's National Law Center, Washington.

STATEMENT OF MARCIA D. GREENBERGER, ESQ., WOMEN'S NATIONAL LAW CENTER, WASHINGTON, DC

Ms. GREENBERGER. Thank you, Mr. Chairman. I am Marcia Greenberger. I am pleased to be here today to urge the quick passage of H.R. 5490. This legislation is needed to assure that we have strong laws prohibiting discrimination on the basis of race, national origin, sex, disability and age.

However, because I have worked particularly in the area of sex discrimination, my testimony will be directed toward the title IX aspects of the bill.

Nonetheless, I do want to note that woman face discrimination not only because of their gender, but also on the basis of race, national origin, disability and age. And given the overlapping nature of discrimination, and the similarity of approaches of the statute, all aspects of this bill are of critical importance and are properly addressed together.

I included in my written remarks a quote that former Representative Patsy Mink made when the title IX legislation was first being considered in the House 12 years ago, because it seemed certainly as relevant today as it was then. And there was one particular sentence that I thought beared mentioning and repeating in this context, and that was that "millions of women pay taxes into the Federal treasury, and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access."

Since 1972, we have worked on issues of sex equity in education, with a particular emphasis on title IX to assure fair treatment of women and girls. I have been cocounsel for parties or represented amici curiae in many of the title IX cases which have been brought in the courts. In particular, I was cocounsel representing the American Association for University Women in the *Grove City College* v. *Bell* case in the Third Circuit Court of Appeals and in the Supreme Court. In fact, the third circuit opinion cited to and relied upon the brief filed by AAUW in support of its holding that student aid brought the entire school within the scope of title IX.

The Supreme Court's reversal of the third circuit's holding on this point and the Supreme Court's acceptance of a narrower interpretation of the scope and coverage of title IX, seriously impair the law's effectiveness as a tool to end sex discrimination in education. Given the fact that title IX is the only Federal law which protects both students and employees in education, its weakening is particularly serious.

My written remarks highlight some of the problems of sex discrimination in education that were rampant when title IX was passed in 1972. And they include some of my own personal remembrances of reviewing vocational education guidance tools that had pink forms for girls and blue forms for boys, and asked very different questions about career aspirations for girls than for boys.

Those forms of very blatant channeling of girls into one area and boys into another have been attacked and in very large measure removed directly as a result of title IX.

But much remains to be done. We still see enormous disparities in the training received by young women and men in vocational education. My testimony includes some charts which really highlight in a very graphic way the enormous sex segregation in vocational education training that is still going on in this country.

We see gaps as well, although there has been much improvement, in scholarships available to young women and men. It had been before title IX there were virtually no athletic scholarships available for young women. And that was a door closed to them as a way of furthering their higher education.

We have seen much progress, but the gaps are still enormous. In fact, there have been some studies that show general financial aid goes in larger amounts to men than it does to women in this country.

There are still enormous segregation in work patterns, in educational institutions, with women filling and holding the lower paying, lower prestigious jobs in these institutions. In short, title IX is needed as much as ever, not only to retain the gains we have made, but to secure continued progress that women in this country deserve.

The *Grove City* Supreme Court case which is the subject of this legislation was a serious narrowing of title IX coverage and also its potential as an enforcement tool. Under *Grove City,* the receipt of Federal student aid was considered to cover only the colleges' financial aid program and as a result *Grove City* is free to discriminate against students in its math or science program, yet so long as financial aid program is not discriminatory, the Federal students dollars can flow with impunity to the general fund and support all of the college's activities including math and science.

The effects of this narrowing are beginning to be felt. The Department of Education has begun to close complaints and narrow interpretations, even where discrimination has been found on the grounds that in its view, after the *Grove City* decision, title IX no longer prohibits discrimination. And I have attached to my testimony copies of some letters that have been sent out from the Department of Education closing investigations that they had conducted and in some cases found discrimination on the grounds that after *Grove City* in their view they no longer are going to be looking into these matters any longer.

They are clear cut demonstrations of a loss of protection women and girls have suffered when the *Grove City* college case was decided.

H.R. 5490 restores title IX and the other civil rights laws back to where they were before *Grove City* was decided. The law does nothing more and nothing less.

By requiring recipients of Federal funds to comply with the nondiscrimination provisions, the bill assures that when an entity receives Federal funds it must not discriminate in any of its parts. The bill adds a definition of recipient drawn from current regulations. In fact, I might note that definition was followed in the first part of the *Grove City* decision.

Through these changes the bill will eliminate the possibility of further confusion. The definition of recipient makes clear that an institution like *Grove City* is covered in its entirety.

I might add at this juncture that I understood that Assistant Attorney General Reynolds testified this morning in conjunction with this legislation and stated that in his view he thought it would add to the confusion and further litigation in the future.

In fact, I think the exact opposite is true. Right now we are in the midst of having to figure out what the *Grove City College* case means in every instance. They said that student financial assistance is sui generis. That opens questions about how other types of Federal aid are to be treated. It assures years of litigation on the issue of the meaning of *Grove City College* and its application to title IX, let alone all the other statutes at issue.

A clear cut bill such as H.R. 5490 would settle at this point once and for all the basic coverage question, making clear that recipients simply cannot discriminate.

The approach of covering the entire institution is clearly consistent with what the Congress intended when passing title IX. My testimony continues and cites some of the references to legislative history based on title VI, which title IX was modeled after, as well as title IX itself, making clear that Congress intended broad-based coverage.

I also cited on page 8 of my testimony some cases that support the institutionwide coverage. I know that also in Mr. Reynolds' testimony that he stated that there was only one circuit decision supporting institutionwide coverage and had a number of citations to other cases. I did want to address that point, because again I think that point is simply not true.

The *North Haven* decision in the second circuit which reached the issue of what program or activity means in a title IX context interpreted it broadly. That was in the second circuit. Bob Jones in the fourth circuit, as well as *Grove City* in the third circuit. The *El Camino College* case in the ninth circuit took such a broad approach. And I might add not all circuits addressed this issue.

The cases that Mr. Reynolds cited to support the proposition that all of these overwhelming circuits came out the other way are particularly frustrating for me to read personally. The *Othen* case was cited for the proposition that that circuit supported narrow coverage. In fact, that is absolutely not true. The *Othen* case stated that the district court should never have reached the issue of defining what program or activity meant. It said that it came up in the context of an award for attorney's fees and it was improper to rule on it, and didn't say anything at all about the issue. That case simply does not stand for the proposition that Mr. Reynolds cited it for.

The *Hillsdale College* case decided in the sixth circuit was also an interesting case. In fact, that was a case with three judges on the panel—it was a 2-to-1 decision, with a very vociferous dissent. One of the judges said it was one of the worse and most serious setbacks and distortions of the law, a very strong dissent. Of the two judges who supported the narrow reading, one had died before the decision was even issued, and under traditional Justice Department rules and policies, if they had followed them, it would not have been a valid decision. However, the Justice Department did not raise that to the attention of the sixth circuit.

I cited in my testimony as well support for the prompt decision of the enforcement sections of this law that correspond directly with what they were intended to mean in prior law, and how they have been consistently interpreted in the past.

Given these overwhelming indications of Congress' intent and the strong case law supporting that intent to create a broad-reaching statute, one might well ask how a majority of the Supreme Court decided *Grove City* as it did. In fact, it is important to keep in mind that this information was never presented to the court by its party in the case. The two opposing parties were *Grove City College* and the Government. Once the Government switched its position in the Supreme Court, neither side supported the view that institutionwide coverage was intended by title IX.

Moreover, the Government refused to support a petition to the court that third parties be given time to present these arguments in favor of institutionwide coverage to the Supreme Court. Therefore, the Court decided this most critical of issues without hearing from anyone who supported the original long-standing position of the Government.

Prompt action is needed. This bill must move quickly to clarify that indeed broad coverage and effective enforcement is required under the law.

I cite again the fact that the Department of Education started to close down investigations and dismiss complaints and compliance reviews even where discrimination is found. We now know Federal dollars will be flowing to institutions which even the Department of Education has found to discriminate. Moreover, the amounts of Federal dollars at issue are enormous.

When title IX was promulgated, the House report listed many categories of Federal financial assistance covered by the statute. From basic education opportunity grants to guaranteed student loans to construction moneys to myriad grants and contract programs, the list was long. All of these categories still exist and new funding programs have been added.

In my written testimony I added a footnote on page 11 dealing with the guaranteed student loan issue which in my view is a form of Federal financial assistance clearly covered by the law. Again, that was an issue raised in the *Grove City College* case. The lower court held guaranteed students loans were not covered, the Government appealed.

Following a long-standing position they were covered, and constituted Federal financial assistance. The Government then basically dropped the appeal on that issue.

That billions of dollars could be used to support discrimination is simply unacceptable. The rights of women, minorities, disabled persons and older Americans depend on Congress' speedy action to correct this terrible wrong.

Thank you.

Chairman **Perkins**. Thank you for a excellent statement.

[Prepared statement of Marcia D. Greenberger follows:]

Prepared Statement of Marcia D. Greenberger, Attorney, National Women's Law Center, Washington, DC

Mr. Chairman and members of the Judiciary and Education and Labor Committees, I am Marcia Greenberger, an attorney with the National Women's Law Center. I am pleased to be here today to urge the quick passage of H.R. 5490. This legislation is needed to assure that we have strong laws prohibiting discrimination on the basis of race, national origin, sex, disability and age. However, because I have worked particularly in the area of sex discrimination, my testimony will be directed toward the Title IX aspects of the bill. Nonetheless, I do want to note that women face discrimination not only because of their gender, but also on the basis of race, national origin, disability and age. Given the overlapping nature of discrimination, and the similarity of approach of the statutes, all aspects of this bill are of critical importance and are properly addressed together.

In 1972, Rep. Patsy Mink summed up the compelling need for Title IX. Her words are as true today as they were 12 years ago:

"Any college or university which has [a] * * * policy which discriminates against women applicants * * * is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access." 118 Cong. Rec. 5806–5870 (1972)

Since 1972, we have worked on issues of sex equity in education, with a particular emphasis on Title IX to assure fair treatment of women and girls. I have been cocounsel for parties or represented amici curiae in many Title IX cases which have been brought in the courts. In particular, I was co-counsel representing the American Association for University Women (AAUW), et al. in the *Grove City College* v. *Bell* case in the Third Circuit Court of Appeals and in the Supreme Court. In fact, the Third Circuit opinion cited to and relied upon the brief filed by AAUW in support of its holding that student aid brought the entire school within the scope of Title IX.

The Supreme Court's reversal of the Third Circuit's holding on this point, and the Supreme Court's acceptance of a narrower interpretation of the scope and coverage of Title IX, seriously impair the law's effectiveness as a tool to end sex discrimination in education. Given the fact that Title IX is the only federal law which protects both students and employees in education, its weakening is particularly serious.

TITLE IX HAS MADE IMPORTANT HEADWAY IN COMBATING SEX DISCRIMINATION IN EDUCATION, BUT MUCH DISCRIMINATION REMAINS

Title IX has made a real contribution towards sex equity in education. I remember when I first began to work on these issues I was asked to review the Strong Vocational Interest Blank test, which was in use around the country to assist in counseling students as to future careers. At that time, the girls were given pink sheets asking their interests in a limited set of careers stereotyped as "women's jobs." I remember in particular a question on whether the girl taking the test would want to be wife of the President of the United States. I wondered then how one prepared for that career if the answer was yes. The boys were given blue sheets, where higher paying jobs were suggested. The question they were asked was whether they wanted to be President. With the passage of Title IX, the separate tests were eliminated. Our girls must now be given career options which are as broad and as varied as those presented to our boys.

Title IX has meant many other important things as well. It has opened up scholarships, particulary in the area of athletics, so that young women have a chance to secure a higher education through their athletic ability. It has provided an awareness of the problem of sexual harassment in schools, and a mechanism for dealing with the problem. It has opened the door of many graduate professional programs such as law and medicine to women.

But much remains to be done. For example, we still see enormous disparities between the vocational opportunities given to young men and women. Vocational education enrollment remains highly sex-segregated and sex-stereotyped, mirroring the employment patterns in the workforce. In 1980, within federally-funded vocational programs women were concentrated in traditionally female course areas of home economics, health, office occupations, and consumer and homemaking programs; men dominated agricultural, technical, trade and industrial programs. League of Women Voters Education Fund, "Achieving Sex Equity in Vocational Education," 4 (1982). Recent progress in enrolling women in a more varied range of options has been most evident in those areas which are least sex-stereotyped as male or female, or which are considered male domains but viewed as "light" and "clean" work—graphic arts, applied design and electronic accounting. Id. at 13.

The following chart from the report of the National Advisory Council on Women's Education Programs, "Increasing Sex Equity 1980 Update" 6 (1982), summarizes the enrollment patterns of women in vocational education programs in recent years:

WOMEN ENROLLED IN NONTRADITIONAL, MIXED, AND TRADITIONAL [1] VOCATIONAL PROGRAMS BY OCCUPATIONAL TRAINING AREA AND YEAR, UNITED STATES

[In percent]

	1972	1976	1978	1980
Nontraditional: Total	5.4	8.8	11.1	12.5
Trade and industry	5.4	7.8	9.5	10.2
Agriculture	3.9	9.6	13.1	16.6
Distributive education	14.6	23.4	16.7	17.2
Technical	8.6	12.2	16.7	19.0
Mixed: Total	50.5	51.8	55.7	59.0
Trade and industry	40.6	38.0	46.7	53.0
Agriculture	26.9	40.5	45.0	44.6
Distributive education	46.3	48.7	52.2	55.9
Health	63.2	56.1	57.7	69.8
Business	56.8	57.1	60.5	61.5
Technical	31.8	46.6	46.2	51.5
Traditional: Total	86.7	85.8	85.7	86.7
Trade and industry	87.1	85.1	86.2	89.6
Health	90.9	89.2	89.3	91.6
Home economics	86.1	84.7	82.5	80.7
Business	86.0	85.4	85.6	86.3

[1] Definitions of nontraditional, mixed, and traditional programs are based on the percentage of women enrolled in vocational education courses nationally in 1972. Nontraditional programs are those in which the enrollment of women in 1972 was 0.0 to 25%. Mixed programs are those in which the enrollment of women in 1972 was 25.1% to 75.0%. Traditional programs are those in which the enrollment of women in 1972 was 75.1% to 100%.

Source: Based on 1972–78 data from U.S. Department of Health, Education, and Welfare, Bureau of Occupational and Adult Education (BOAE); 1980 data from U.S. Education Department, National Center for Education Statistics, Vocational Education Data System (VEDS).

The least progress has been seen in the building trade areas—for example masonry, electricity and plumbing—in which few women enroll, and fewer yet complete the program. Id. at 14.

As of 1980, enrollment of women in none of the following thirteen categories exceeded five percent:

Program	*Percent*
Air conditioning	2.7
Body and fender repair	3.0
Auto mechanics	4.6
Carpentry	4.5
Masonry	2.3
Plumbing and pipefitting	2.7
Diesel mechanics	2.3
Electrical occupations	3.9
Sheet metal occupations	3.7
Tool and die	4.2
Other metalworking	4.7
Firefighter training	4.8
Small engine repair	4.0

"Increasing Sex Equity 1980 Update," supra, at 7.

We see wide gaps in the athletic scholarships given to men and women, and in fact one recent study shows a gap in general student aid going to women and men.[1] We see little progress in employment of women in education in the better paying jobs and higher ranks. Title IX is needed as much as ever, not only to retain the gains we have made, but to secure continued progress that women in this country deserve.

THE GROVE CITY DECISION SERIOUSLY NARROWS TITLE IX'S EFFECTIVENESS, BOTH WITH RESPECT TO COVERAGE AND ENFORCEMENT

Under the *Grove City* case, the receipt of federal student aid was considered to cover only the college's financial aid program. Therefore, Grove City College is free to discriminate against students in its math or science program, yet so long as the financial aid program is not discriminatory the federal student dollars can flow with impunity to its general fund, supporting all of the college's activities including its math and science departments.

The effects of this narrowing are beginning to be felt. The Department of Education has begun to close complaints and narrow interpretations, even where discrimination has been found, on the grounds that in its view after the *Grove City* decision Title IX no longer prohibits the discrimination. Copies of some of the Department of Education letters are attached to my statement. They are a graphic demonstration of the loss of protection women and girls have suffered when *Grove City College* was decided.

H.R. 5490 RESTORES THE LAW TO ITS FORMER STRENGTH

H.R. 5490 puts the four civil rights laws back to where they were before *Grove City* was decided. It does nothing more and nothing less.

By requiring "recipients" of federal funds to comply with the nondiscrimination provisions, the bill assures that when an entity receives federal funds, it must not discriminate in any of its parts. The bill then adds a definition of "recipient" drawn from current regulations, and followed in the first part of the *Grove City* decision. Through these changes, the bill will eliminate the possibility of further confusion. The definition of recipient makes clear that an institution like Grove City is covered in its entirety.

The approach of covering the entire institution is clearly consistent with what Congress intended when passing Title IX. When Title IX was pending, Representative Green explained:

"The purpose of title [IX] is to end discrimination in all institutions of higher education. Yes, across the board. * * *" 117 Cong. Rec. 39256 (1971)

And it was only with such across the board coverage that Title IX could be the "strong and comprehensive measure" Senator Bayh described and clearly intended the law to be. 118 Cong. Rec. 5804 (1972)

Moreover, by modeling Title IX after Title VI of the 1964 Civil Rights Act, Congress adopted and approved a statutory scheme which had been interpreted to be strong, providing across-the-board coverage. Not only agency regulations and enforcement, but case law decided before Title IX was passed confirmed this board approach under Section 601 of Title VI. See e.g. *United States* v. *Jefferson Company Board of Education,* 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F. 2d 385, Cert. denied sub nom.; *Caddo Parish Board of Education* v. *United States,* 389 U.S. 840 (1967); *Bossier Parish School Board* v. *Lemon,* 370 F.2d 847 (5th Cir.), cert denied, 388 U.S. 911 (1967); *Board of Public Instruction of Taylor Co.* v. *Finch,* 414 F.2d 1068 (5th Cir 1969).

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[1] Moran, Mary, Student Financial Assistance: Next Steps to Improving Education and Economic Opportunity for Women, soon to be available from ERIC Clearinghouse on Higher Education and from the Association for the Study of Higher Education, Washington, D.C.

The enforcement sections of title VI and IX (Sections 602 and 902) were also designed with care. Government agencies providing federal funds are obligated to provide an enforcement scheme which includes fund termination in the event that efforts to conciliate fail, or referral to the Justice Department for a court suit to secure the end of the discrimination. Where fund termination is used, the government is obligated to "pinpoint" the funds terminated. The "pinpoint" obligation was defined in *Taylor County* v. *Finch* supra, decided under title VI before title XI was passed. Under *Taylor County,* funds could be terminated if those funds "support" the discrimination. That test of support is now maintained by this bill.

Moreover, since title IX was passed, Congress has consistently refused to narrow its scope. As was true for title VI, HEW promulgated regulations tracing the title VI approach and broadly interpreting the scope of title IX. See 34 C.F.R. Part 106. The regulations were approved by the President and sent to Congress for review.[2]

Congressman O'Hara held six days of hearings on the title IX regulations. He described the hearings as designed to determine "whether or not the regulations as they are written are consistent with the law, or whether they should be returned to the agency for redrafting until they are consistent with the law from which they must draw their authority." (Hearings on Title IX Before the Subcommittee on Postsecondary Education of the House, Committee on Education and Labor, 94th Cong., 1st Sess. 97 (1975).) Proposed concurrent resolutions that would have disapproved the regulations were not approved by either House of Congress.

Congress has also consistently refused to approve express efforts to limit the coverage of Title IX to programs and activities directly receiving federal funds. One such effort was an amendment introduced by Senator Helms in 1975. He explained: ["t]he bill provides that *title IX shall apply only to education programs and activities which directly receive federal financial assistance.* * * * *" 122 Cong. Rec. 23846 (1975) (Emphasis supplied). Senator Helms' bill was not passed.*

Given these overwhelming indications of Congress' intent to create a broad-reaching statute, one might well ask how a majority of the Supreme Court decided *Grove City* as it did. In fact, it is important to keep in mind that this information was never presented to the Court by either party in the case. The two opposing parties were Grove City College and the government. Once the government switched its position in the Supreme Court, neither side supported the view that institution-wide coverage was intended by title IX. Moreover, the government refused to support a petition to the Court that third parties be given time to present arguments in favor of institution-wide coverage to the Supreme Court. Therefore, the Court decided this most critical of issues without hearing from anyone who supported the original long-standing position of the government.

PROMPT ACTION IS NEEDED

It is important that this bill move quickly, to clarify that indeed broad coverage and effective enforcement is required. We have seen the Department of Education begin to close cases and narrow its efforts. Federal dollars will now be flowing to institutions which even the Department of Education has found to discriminate. Moreover, the amounts of federal dollars at issue are enormous. When title IX was promulgated, the House Report listed many categories of federal financial assistance covered by the statute. H.R. Rep. No. 5544, 92nd Cong., 1st Sess. (1971), reprinted in [1972] U.S. Code Cong. & Admin. News 2462. From Basic Education Opportunity Grants to Guaranteed Student Loans to construction monies to myriad grant and contract programs, the list was long. All of these categories still exist, and many new funding programs have been added.[3]

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[2] Pursuant to the General Education Provisions Act, 20 U.S.C. § 1232, title IX regulations could not become effective until Congress has had 45 days to review the regulations and to reject them. Although the statute was later amended to provide that failure to disapprove regulations did not constitute a finding of consistency with the underlying legislation, see 20 U.S.C. § 1232, (d), the regulations were finalized before the law was so amended.

[3] The District Court in *Grove City College* held that Guaranteed Student Loans are federal financial aid to schools but are not federal financial assistance subject to government enforce-

Continued

That billions of dollars could be used to support discrimination is simply unacceptable. The rights of women, minorities, disabled persons and older Americans depend on Congress' speedy action to correct this terrible wrong.

U.S. DEPARTMENT OF EDUCATION,
Washington, DC, March 6, 1984.

Dr. BRYCE JORDON,
President, Pennsylvania State University,
University Park, PA.

DEAR DR. JORDON: The Office for Civil Rights (OCR) advised you on February 23, 1982 and April 14, 1982 of its decision to investigate the complaint against The Pennsylvania State University (Penn State) filed by Mr. Timothy K. Conley on behalf of the Women's Soccer Club under Title IX of the Education Amendment of 1972. In letters dated March 15, 1982 and May 6, 1982 Penn State declined to participate in the proposed investigation pending judicial or executive clarification of whether Title IX is applicable to a program or activity which is not the recipient of Federal funds.

In light of the recent Supreme Court decision in *Grove City College* v. *Bell,* it appears that OCR does not have jurisdiction to investigate the complaint of sex discrimination in Penn State's athletic program. We are, therefore, closing the above referenced complaint.

Sincerely,

HARRY M. SINGLETON,
Assistant Secretary for Civil Rights.

U.S. DEPARTMENT OF EDUCATION,
Philadelphia, PA, March 2, 1984.

Our Ref: 03770308; 03812028

Re: Title IX Intercollegiate Athletics Compliance Review

Dr. JOHN TOLL,
President, University of Maryland,
College Park, MD.

DEAR DR. TOLL: By letter dated February 23, 1984, the Office for Civil Rights sent the University of Maryland College Park (UMCP) a statement detailing those aspects of its intercollegiate athletic program which we had concluded violated Title IX of the Education Amendments and its implementing regulation at 34 C.F.R. Section 106.41(c). These areas had been identified previously for the University and were discussed at a meeting with UMCP officials and representatives on January 24, 1984.

On February 27, 1984, we received a letter from Assistant Attorney General Frederick G. Savage, on behalf of UMCP, responding to the concerns that OCR and UMCP representatives had discussed at the January 24, 1984 meeting. This letter set forth actions already taken and planned to be taken by the University in the areas of travel, provision of locker rooms, recuitment, support services, and the accommodation of student interest.

Since receiving Mr. Savage's letter, we have carefully reviewed our records of Federal financial assistance to UMCP's athletic program. We have concluded that we do not have jurisdiction to pursue this matter further, since the outstanding issues do not concern the operation of UMCP's athletic financial assistance program, which we found to be in compliance with Title IX and 34 C.F.R. Section 106.37(c). We remain available to provide members of your staff with technical assistance in the area of intercollegiate athletics, upon request.

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ment under title IX on the grounds that they fit within the statutory exception of contracts of insurance or guaranty. Because the GSL program provides a substantial interest subsidy as well as special allowance payments in addition to the guaranty, all past administrations correctly took the position that the GSL program goes beyond the exemption and is included. However, the Justice Department dropped the appeal on this issue originally taken by the government, so that the *Grove City College* case ultimately dealt only with Basic Education Opportunity Grants. See Hearings before the Committee on Education and Labor, Subcommittee on Postsecondary Education, House of Representatives concerning Guaranteed Student Loans on May 13, 1982.

I would like to thank you and your staff for the courtesy and cooperation extended during the course of this review.

Very truly yours,

RONALD GILLIAM,
For DEWEY E. DODDS, *Director,*
Office for Civil Rights, Region III.

AUGUST 10, 1983.

Re: Docket Number 04-81-2005

Dr. WILFORD S. BAILEY,
Acting President, Auburn University,
Auburn, AL.

DEAR DR. BAILEY: By a letter dated July 2, 1981, the Office for Civil Rights (OCR) of the Department of Education (formerly of the Department of Health, Education and Welfare) informed you that it planned to conduct an investigation of the above referenced complaint alleging discrimination on the basis of sex in the intercollegiate athletic program. The complaint alleged that the University is not accommodating the interests and abilities of its female students as required by the Title IX Regulation. In addition, the complaint alleged sex discrimination in the provision of athletic-based financial assistance, the assignment and compensation of coaches, the provision of locker rooms, practice and competitive facilities, the provision of trainers, recruitment, the provisions for travel and per diem, housing, and publicity.

Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681 (hereinafter cited as Title IX), provides:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

In addition, the provisions of HEW's implementing regulation for Title IX, 34 CFR Part 106, which became effective on July 21, 1975, and was adopted by the Education Department on May 9, 1980, set forth specific requirements regarding intercollegiate athletics (copy enclosed). Athletic scholarships are addressed at 34 CFR Section 106.37(c). The general prohibition of discrimination on the basis of sex in intercollegiate athletic programs is addressed at 34 CFR Section 106.41.

Because the Title IX regulation established separate legal standards for the provision of equal athletic opportunity in program areas other than financial assistance, OCR has assessed compliance with the two sections of the regulation individually.

As a means of assessing compliance, we have followed the directions provided in the Policy Interpretation issued by the Department of Health, Education, and Welfare on December 11, 1979. 44 Fed. Reg. 71413 et seq. (1979).

In assessing compliance with Section 106.37, OCR considered 1) whether the total amount of athletic scholarship aid available to male and female athletes was substantially proportionate to their rates of participation in intercollegiate athletics; and 2) whether different types of non-grant athletic assistance were proportionately available to male and female athletes.

We assessed compliance with 34 CFR Section 106.41(c) by reviewing the overall intercollegiate athletics program. We reviewed the ten factors listed in the regulation plus the recruitment of student athletes and the provision of support services. (As explained in the Policy Interpretation, the regulation authorizes OCR to consider factors other than those listed in the regulation.)

In each program area we examined whether the availability, quality and kinds of benefits, opportunities and treatment provided were equivalent for both sexes. Equivalent is defined as equal or equal in effect. It is important to note that we compared the men's program and the women's program on an overall basis, rather than on a sport-by-sport basis that would pair, for example, men's basketball and women's basketball. Where disparities were noted, we considered whether the differences were negligible. Where the disparities were not negligible, we determined whether they were the result of nondiscriminatory factors. Finally, we determined whether disparities resulted in the denial of equal opportunity to male or female athletes, because the disparities collectively were of a substantial and unjustified nature, or because the disparities in individual program areas were substantial enough in and of themselves to deny equality of athletic opportunity.

The regulation at 34 CFR Section 106.41(c) provides that "unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex." Where appropriate, we have considered the level of funding for men's and women's programs in assessing the equivalence of benefits and opportunities.

SUMMARY OF FINDINGS

Athletic financial assistance

In 1981-82, Auburn awarded 83% of all financial aid based on athletic ability to men and 17% to women. Men comprised 75% of all participants while women comprised 25% (1981-82) of all participants. OCR determined that the differences in these awards were significant and finds that Auburn University is not in compliance with 34 C.F.R. Section 106.37(c).

Other program areas

OCR finds that Auburn University is providing male and female athletes equivalent treatment, benefits and opportunities in the following areas: provision and maintenance of equipment and supplies, scheduling of games and practice times, opportunity to receive academic tutoring and assignment and compensation of tutors, provision of medical and training facilities and services, provision of housing and dining facilities and services, publicity, and provision of support services.

OCR found that benefits, opportunities and treatment were not equivalent in the areas of travel and per diem allowances, coaching, the provision of locker rooms, practice and competitive facilities, recruitment of student athletes, and the accommodation of interest and abilities.

Enclosed is a Statement of Findings which provides a more complete description of the general background, scope and method of investigation of the review. It states the factual findings of the investigation and describes the bases for the conclusions. The report is divided into two principal parts: Athletic Financial Assistance and Other Program Areas.

This letter of findings addresses only the issues listed above and should not be interpreted as a determination of Auburn University's compliance or noncompliance with Title IX in any other respect. It should be emphasized that the findings and conclusions in this letter and the attached Statement of Findings are based on the applicable provisions of the Title IX implementing regulations and the Policy Interpretation described above.

You are requested to submit a plan to correct the violations of Title IX within 7 days. After receipt of the plan, there will be an evaluation period during which we shall communicate with you or your representatives as necessary, regarding clarifications or modifications of the plan. After this evaluation period, OCR must either accept the plan or initiate enforcement proceedings. We are compelled to adhere to specific timeframes in resolving a case by an Order of the U.S. District Court of the District of Columbia, dated March 11, 1983. OCR is available to assist you in developing an acceptable corrective plan.

The Freedom of Information Act requires that the Office for Civil Rights release this letter and other information about this case upon request by the public. In the event that OCR receives such a request, we will protect information that identifies individuals or that may constitute an invasion of privacy, and will inform the University if we are compelled to release information.

We wish to thank you and your staff for the cooperation shown throughout this matter. If you have further questions, please do not hesitate to call me at (404) 221-2954, or Louis O. Bryson, Sr., Director, Postsecondary Education Division, at (404) 221-2970.

Sincerely yours,

WILLIAM H. THOMAS, *Director*.

Mr. PERKINS. The next witness is Arlene Mayerson. Go right ahead.

STATEMENT OF ARLENE B. MAYERSON

Ms. MAYERSON. Mr. Chairman and members of the committee, my name is Arlene Mayerson. I am the directing attorney for the Disability Rights Education and Defense Fund [DREDF]. Our organization is a national research, education, community organizing and advocacy organization dedicated to the integration and equal opportunity of 36 million disabled Americans. I am honored to be here today to testify on H.R. 5490 not only on behalf of my organization but also on behalf of the following national organizations:

American Coalition of Citizens with Disabilities
American Council of the Blind
American Speech-Language-Hearing Association
Association for Children with Learning Disabilities
Association of Retarded Citizens
Council on Exceptional Children
Conference of Education Administrators Serving the Deaf
Epilepsy Foundation of America
National Easter Seals Society
National Council of Independent Living Programs
National Council on Rehabilitation Education
National Rehabilitation Association
Paralyzed Veterans of America
The Convention of American Instructors of the Deaf
The National Association of Private Residential Facilities for the Mentally Retarded, and
United Cerebral Palsy Association, Inc.

The passage of section 504 in 1973 was an historic event for disabled Americans. For the first time Congress recognized that disabled people, like minorities and women, were subject to discrimination and were entitled to basic civil rights protections. This represented a major shift in disability public policy and a fundamental challenge to traditional notions about disability.

The historic significance of section 504 for disabled people cannot be overstated. For disabled people, section 504 means the freedom to choose, to belong, to participate, to have dignity and the opportunity to achieve. Since enactment of section 504 just a decade ago, the character of American society has been transformed. It can no longer be assumed that disabled people, adults and children, will be "out of sight, out of mind," shut away in institutions, nursing homes and segregated schools and programs.

Because of section 504, disabled people are beginning to take their rightful place in the mainstream of American life. In section 504, Congress extended the promise of equal citizenship for 36 million disabled Americans. We have come a long way toward that goal in 10 short years—the gains are impressive—but we are only just beginning, the path to equality is long. We are here today because we believe that the Supreme Court's decision in Grove City College hopelessly obstructs this path.

According to the *Grove City* decision, that college would be free to refuse to admit blind students, to refuse to hire teachers who used wheelchairs or to decide that while disabled people make good social workers, they do not make good engineers, architects, doctors or lawyers. Unfortunately, these practices and this kind of stereotyping is still prevalent today.

The negative impact of the *Grove City College* decision is ironically illustrated in the area of employment. On the same day that the Supreme Court handed down the *Grove City* decision, it decided *Consolidated Rail Corp.* v. *Darrone*, which resolved a 5-year conflict among its circuits and upheld broad employment coverage under section 504. The *Darrone* decision was hailed as a major victory for disability rights. But like in all other areas under 504, and the other civil rights statutes, the *Grove City* decision threatens to drastically limit the applicability of the employment protections which we have only so recently won.

This limitation is well illustrated in a case which is currently pending before the Department of Education. In that case, the Department of Education, after an investigation, found that a teacher who had lupus had been discriminated against solely on the basis of her disability. The school district now claims that OCR no longer has jurisdiction to pursue the case after *Grove City* because that teacher had been hired to teach math and physical education and neither of these "programs" received direct Federal funds. Claims such as this one could take years of litigation to resolve.

Under previous law and administrative policy the jurisdiction of OCR to investigate this claim was clear. The written testimony which we have submitted fully sets forth the legislative history of section 504, and demonstrates that Congress intended to create a broad policy of nondiscrimination by all recipients of Federal funds. However, I would like to highlight one particularly compelling point here.

In 1977 Congress conducted oversight hearings on section 504 in which it reviewed the HEW 504 regulations which had incorporated the title VI procedural enforcement regulations. The title VI procedural enforcement regulations provide for investigation and review of recipients of Federal funds as that term is defined in the regulations. No mention is made of programs until the sections dealing with fund termination.

Congress explicitly approved this practice and has stated in a Senate report the 1978 amendments to section 504 "codify this existing practice as a specific statutory requirement."

There can be no doubt that the long hsitory of administrative enforcement of title VI was known by Congress and reaffirmed in 1978. Indeed, there was nothing radical in 1978 about the fundamental principle that the Federal Government should not fund recipients who discriminate. Nor was there any question that the Federal Government had a critical role in preserving and protecting basic civil rights.

The cry of Federal intrusion by opponents of H.R. 5490 is not new to the disability community. But what is being called Federal instrusion is the Federal protection that disabled Americans depend upon.

Not only disabled adults, but parents of disabled children have depended on this Federal protection to secure basic fundamental rights for their children. When this administration sought to weaken the Public Law 96-142 and section 504 regulations assuring each child a free appropriate public education, they claimed that the regulations were too intrusive, and that educational integrity and local control needed to be preserved.

Well, thousands of parents from across the country came forward to test about the differences these laws have made in their children's lives, and begged the policymakers for that continued Federal intrusion.

Now is not the time to question the role of the Federal Government in assuring that entities which accept Federal funds do not violate basic civil rights protections. This Nation made that commitment over 20 years ago. For disabled Americans, that commitment in 1973 has formed the ground upon which hopes and dreams and realities grow. The doors have been opened and section 504 is working. Since 1977 when the 504 regulations were promulgated, one national study reports that the number of disabled freshmen has more than doubled. We have conducted an informal review of colleges and universities across the country and the reports we have heard would make Congress proud of what has been achieved in just 10 years.

Ohio State University is a typical example. In 1978 there were 32 students who were identified as disabled. In 1984 there were 662 disabled students. The campus went from being almost totally inaccessible to nearly fully accessible. The students' needs are fully met through a well-developed network of volunteers and effective interagency cooperation. All across the country in small and large institutions enormous progress was reported, and in each case the existence of section 504 was given as the primary reason.

Once again, disabled Americans turn to Congress to reaffirm the basic principles of equal opportunity through passage of H.R. 5490, which is nothing more than a clarification of Congress' long-standing intent that recipients of Federal funds are prohibited from engaging in discriminatory practices. We are confident that this Nation's commitment to disabled citizens which was firmly established in 1973 will not now be abandoned.

Thank you.

[Prepared statement of Arlene B. Mayerson follows:]

PREPARED STATEMENT OF ARLENE B. MAYERSON, ON BEHALF OF THE DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, AMERICAN COALITION OF CITIZENS WITH DISABILITIES, AMERICAN COUNCIL OF THE BLIND, AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION, ASSOCIATION FOR CHILDREN WITH LEARNING DISABILITIES, ASSOCIATION OF RETARDED CITIZENS, COUNCIL ON EXCEPTIONAL CHILDREN, CONFERENCE OF EDUCATION ADMINISTRATORS SERVING THE DEAF, EPILEPSY FOUNDATION OF AMERICA, NATIONAL EASTER SEALS SOCIETY, NATIONAL COUNCIL OF INDEPENDENT LIVING PROGRAMS, NATIONAL COUNCIL ON REHABILITATION EDUCATION, NATIONAL REHABILITATION ASSOCIATION, PARALYZED VETERANS OF AMERICA, THE CONVENTION OF AMERICAN INSTRUCTORS OF THE DEAF, THE NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED, AND UNITED CEREBRAL PALSY ASSOCIATION, INC.

Mr. Chairman and Members of the Committees, my name is Arlene B. Mayerson. I am the directing attorney for the Disability Rights Education and Defense Fund (DREDF). Our organization is a national research, education, community organizing and advocacy organization dedicated to the integration and equal opportunity of 36 million disabled Americans. I am honored to be here today to testify on H.R. 5490 not only on behalf of my organization but also on behalf of the following national organizations:

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The Convention of American Instructors of the Deaf

The National Association of Private Residential Facilities for the Mentally Retarded

United Cerebral Palsy Association, Inc

We have submitted written testimony to the Committees and request that it be included in the record. The written testimony sets forth the legislative history of Section 504 and the administrative interpretations which demonstrate that Section 504 was intended to establish a broad governmental policy of non-discrimination by all recipients of federal financial assistance.

The passage of Section 504 in 1973 was an historic event for disabled Americans. For the first time Congress recognized that disabled people, like minorities and women, were subject to discrimination and were entitled to basic civil rights protections. This represented a major shift in disability public policy and a fundamental challenge to traditional notions about disability. Historically, the inferior economic and social status of disabled people was accepted as an inevitable consequence of being disabled. Section 504's anti-discrimination language evidences Congress' understanding that many of the problems faced by disabled people are not inevitable, but are instead the result of discriminatory policies and practices based on unfounded and outmoded stereotypes and prejudices toward disabled people. In Section 504, Congress sought to reverse a long history of exclusion and segregation of disabled people. No longer would the invisibility of disabled people be taken for granted in this country.

The historic significance of Section 504 for disabled people cannot be overstated. For disabled people, Section 504 means the freedom to choose, to belong, to participate, to have dignity and the opportunity to achieve. Since enactment of Section 504 just a decade ago, the character of American society has been transformed. It can no longer be assumed that disabled people, adults and children, will be "out of sight, out of mind," shut away in institutions, nursing homes and segregated schools and programs. Because of Section 504, disabled people are beginning to take their rightful place in the mainstream of American life. In Section 504, Congress extended the promise of equal citizenship for 36 million disabled Americans. We have come a long way towards that goal in ten short years—the gains are impressive—but we are only just beginning—the path to equality is long. We are here today because we believe that the Supreme Court's decision in *Grove City College* hopelessly obstructs this path.

Under the *Grove City College* decision the regulations which were promulgated in 1977 by HEW after years of study and deliberation and after review and approval by Congress would be rendered meaningless. The regulations correctly recognize that the recipient of federal funds is required to assure non-discrimination in all of its programs. According to the *Grove City* decision, that college would be free to refuse to admit blind students, to refuse to hire teachers who used wheelchairs or to decide that while disabled people make good social workers, they do not make good engineers, architects, doctors or lawyers. Because of this kind of stereotyping, disabled people have been and continue to be dissuaded from those careers, and many others, because of their disabilities. In a recent case in Colorado, a psychiatrist with outstanding credentials was rejected from a psychiatric residency program because he had multiple sclorosis and used a wheelchair. The court held that the school had violated Section 504 because the admissions committee decision was based entirely on stereotypes and not on the credentials of the disabled applicant and the University was ordered to admit him. *Puskin* v. *Regents of the University of Colorado*, 658 F.2d 2372 (10th Cir. 1981).

The need for strong anti-discrimination provisions to assure equal opportunity and the negative impact of the *Grove City College* decision is ironically illustrated in the area of employment. On the same day that the Supreme Court handed down the *Grove City* decision, it decided *Consolidated Rail Corporation* v. *LeStrange Darrone*, 465, U.S. 104 S Ct. 1248 (1984) which resolved a five year conflict among the circuits and upheld broad employment coverage under § 504. The *Darrone* decision was hailed as a major victory for disability rights. But like in all other areas under § 504 and the other civil rights statutes, the *Grove City* decision threatens to drastically limit the applicability of employment protections under § 504. A recipient could argue that its employment practices were shielded from § 504 if the personnel office received no federal funds. Alternatively, certain departments within a college or university or even a school district could discriminate while others could not depending on whether the department directly received federal funds. Such a claim has recently been made in a case pending before the Department of Education. In that case the Department of Education, after an investigation, found that a teacher who had lupus had been discriminated against "solely on the basis of disability."

The school district claimed that OCR no longer had jurisdiction to pursue the case after *Grove City* because the teacher had been hired to teach math and physical education and neither of these "programs" received federal funds. 17 Education Daily, p. 4 (April 11, 1984). Under previous law and administrative policy the jurisdiction of OCR to investigate was clear. Claims such as this one could involve years of litigation to resolve.

As I stated earlier, the written testimony which we have submitted fully sets forth the legislative history of Section 504 and demonstrates that Congress intended to create a broad policy of non-discrimination by recipients of federal funds. However, I would like to highlight one particularly compelling point here. In 1977 Congress conducted oversight hearings on Section 504. As part of that process Congress reviewed the § 504 regulations which had been promulgated by HEW that same year. In addition to the substantive provisions, HEW incorporated the Title VI procedural enforcement regulations into the § 504 regulations. Congress explicitly approved this and in the 1978 amendments to § 504 "codifie[d] [this] existing practice as a specific statutory requirement." S. Rep. No. 890, 95th Cong., 2nd Sess. (1978).

The Title VI procedural regulations provide for investigation and review of recipients of federal funds as that term is defined in the regulations. No mention is made of programs until the sections dealing with fund termination. 45 C. FR § 80.7; 80.8(c). Hence, in keeping with this well established practice, the 1978 amendment to Section 504 provides that:

"The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1974 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal providers of such * * *"

There can be no doubt that the long history of administrative enforcement of Title VI was known by Congress and reaffirmed in 1978. Indeed, there was nothing radical in 1978 about the fundamental principle that the federal government should not fund recipients who discriminate. Nor was there any question that the federal government had a critical role in preserving and protecting basic civil rights. The high sounding ideals raised by opponents of this legislation of "educational integrity," "local control," "plurality" and so on have not carried the day for disabled Americans. No, disabled Americans are still wedded to the ideals of equal opportunity and integration—ideals which history has shown cannot be achieved without an assurance by the federal government that institutions which receive federal funds will be prohibited from discriminating.

A recent case against Baylor University Medical Center demonstrates that high ideals may be insufficient to assure equal access for disabled people. Baylor is one of the universities which is a member of the American Association of Presidents of Independent Colleges and Universities on whose behalf Mr. Hafen testified before the committees on this legislation. In that case a hearing impaired patient alleged that Baylor had refused to permit her to have access to a sign language interpreter which she had contracted for at her own expense and which she needed to communicate effectively with hospital personnel. Baylor refused to allow the government to investigate, claiming that it received no federal financial assistance even though it received both Medicare and Medicaid. The fact that there was an actual claim of discrimination in this case, unlike the *Grove City* case, did not alter Baylor's position that federal "intrusion" is improper.

Not only disabled adults, but parents of disabled children have depended on federal protection to secure basic fundamental rights for their children. In 1975, Congress found that "more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity" and that "one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers." Public Law 94-142, § 3(a). In 1983 the U.S. Department of Education reported that 92% of disabled children were educated in regular schools. (U.S. Dept. of Ed.—5th Annual Report to Congress on implementation of Public Law 94-142 (1983).)

When this Administration sought to weaken the Public Law 94-142 and § 504 regulations assuring each child a free appropriate public education, claiming that the regulations were too "intrusive" and that educational integrity and local control needed to be preserved, thousands of parents from across the country testified about the difference these laws had made in their children's lives and begged the policymakers for continued "federal intrusion."

Now is not the time to question the role of the federal government in assuring that entities which accept federal funds do not violate basic civil rights protections. This nation made that commitment over twenty years ago. For disabled Americans that commitment in 1973 has formed the ground on which hopes and dreams grow.

The doors have been opened. The statute is working.

Since 1977 when the § 504 regulations were promulgated, one national study reports that the number of disabled freshmen has more than doubled. We have conducted an informal review of colleges and universities across the nation and the reports we have heard would make Congress proud of what has been achieved in just ten years. Ohio State University is a typical example. In 1975, there were thirty-two students who identified as being disabled. In 1984 there are six hundred and sixty-two disabled students. The campus went from being almost totally inaccessible to be nearly fully accessible. The students' needs are fully met through a well developed network of volunteers and effective inter-agency cooperation. All across the country, in small and large institutions, enormous progress was reported, and in each case the existence of Section 504 was given as the primary reason.

Once again disabled Americans turn to Congress to reaffirm the basic principles of equal opportunity through passage of H.R. 5490, which is nothing more than a clarification of Congress' longstanding intent that recipients of federal funds are prohibited from engaging in discriminatory practices. We are confident that this nation's commitment to disabled citizens which was firmly established in 1973 will not now be abandoned.

WRITTEN TESTIMONY SUBMITTED BY THE DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

The Disability Rights Education and Defense Fund (DREDF) is a national research, education, community organizing, and advocacy organization. DREDF provides direct information and support to a network of 4,000 disabled individuals and community-based organization throughout the United States on disability civil rights issues and works closely with other national organizations representing disabled people, as well as civil rights organizations and defense funds who work on behalf of other disenfranchized persons.

This written testimony on the 1984 Civil Rights Act (H.R. 5490 and S2568) which supplements the oral testimony of Arlene B. Mayerson (DREDF), directing attorney, is submitted on behalf of the following national organizations:

American Coalition of Citizens with Disabilities
American Speech-Language-Hearing Association
Association of Citizens with Learning Disabilities
Association of Retarded Citizens
Council on Exceptional Children
Conference of Education Administrators Serving the Deaf
Epilepsy Foundation of America
National Society for Children and Adults with Autism
National Easter Seals Society
National Council on Rehabilitation Education
National Rehabilitation Association
The Convention of American Instructors of the Deaf
The National Association of Private Residential Facilities for the Mentally Retarded
United Cerebral Palsy Association, Inc.

The purpose of the written testimony set forth below is to fully document the importance of Section 504 of the 1973 Rehabilitation Act in assuring equal opportunity to 36 million disabled Americans and the devastating effect that the Supreme Court's decision in *Grove City College* has in attaining this Congressional goal. A review of the legislative history of Section 504 and the administrative interpretations which have been endorsed by Congress demonstrate that Congress intended Section 504 to broadly prohibit disability-based discrimination by all recipients of federal funds.

INTRODUCTION

The basic purpose of the 1984 Civil Rights Act of (H.R. 5490 and S. 2568) is to reaffirm this nation's commitment to equality of opportunity by assuring that recipients of federal financial assistance are prohibited from discriminating on the basis of race, national origin, sex, disability or age. Such discrimination is currently prohibited by Title VI, 42 U.S.C. § 2000d, Title IX, 20 U.S.C. § 1681 et. seq., § 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794, and the Age Discrimination Act, 42 U.S.C. § 6101 et seq.

Each of these statutes bars discrimination in any program or activity receiving federal financial assistance. However, on February 23, 1984 the U.S. Supreme Court decided *Grove City College* v. *Bell,* 465 U.S., 104 S. Ct 1211, which gives an unduly restrictive interpretation to the term "program or activity" in Title IX. The court held that a college which receives federal money only in the form of student financial aid is a recipient of federal financial assistance under Title IX, but that under these circumstances, the only part of the college which is covered by Title IX is the student financial aid program. The rest of the college is free to discriminate on the basis of sex. Because Title IX, § 504 and the Age Discrimination Act are all modeled after Title VI which contains the "programs or activity" language, the *Grove City* decison has grave implications for all of this nation's primary antidiscrimination statutes.

Under the Court's interpretation in *Grove City College,* the Congressional purpose in enacting these statutes—to assure that federal funds do not aid discrimination—would be defeated. A university receiving substantial amounts of federal aid could discriminate against blacks, women or disabled people in its medical or law schools so long as these programs were kept free of federal funds. After years of progress in opening the doors to these formerly disenfranchised groups, the Court's decision threatens to shut them once again. (H.R. 5490 and S. 2568) simply reaffirm the purpose of these statutes to broadly prohibit discrimination by all those who chose to accept federal financial assistance.

AMENDMENT TO § 504 CONTAINED IN 1984 CIVIL RIGHTS ACT (S. 2468; H.R. 5490)

In order to assure Congress' original intent that § 504 prohibit discrimination on the basis of disability by all recipients of federal financial assistance, H.R. 5490 (Section 504) is amended by striking out "the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving" and inserting in lieu thereof "participation, be denied benefits, or be subject to discrimination by any recipient of."

Section 504 of the Act would be further amended by inserting "(a)" after the section designated and by adding at the end thereof the following new subsection:

"(b) for the purpose of this section the term 'recipient" means any State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom federal financial assistance is extended directly or through another recipient, including any subunit, successor, assignee, or transferee thereof."

This is in direct conformity with the amendments offered as part of S. 2568 and H.R. 5490 on Titles VI and IX and the Age Discrimination Act.

Section 505(a)(2) is amended by adding "as amended" after Title VI of the Civil Rights Act of 1964."

Section 602 of Title VI is being amended by H.R. 5490 and S. 2568 to clarify the statutes remedial purpose and the scope of the termination authority. Section 602 of title VI is amended to read:

"Each federal department and agency which is empowered to extend federal financial assistance to any recipient, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such recipient by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance to any recipient as to which there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to which such a finding has been made, and shall be limited in its effect to the particular assistance which supports such noncompliance so found, or (2) by any other means authorized by law:

"Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

Since the procedural complaint and enforcement regulations under Title VI which are incorporated by reference into the § 504 regulations are authorized by virtue of Section 602, it is necessary to incorporate the specific Title VI amendment into § 505(a)(2). This is the only purpose of this amendment. As recognized by the Supreme Court in *Consolidated Rail Corporation* v. *Darrone,* the purpose of § 505(a)(2) is to "enhance the ability of handicapped individuals to assure compliance with Section 504." S. Rep. No. 95–890 at 18.

SECTION 504 PROHIBITS RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE FROM DISCRIMINATING ON THE BASIS OF HANDICAP

The legislative history of section 504 evidences congressional intent to broadly prohibit discrimination on the basis of handicap by recipients of Federal financial assistance.—The legislation which became the Rehabilitation Act of 1973 was vetoed twice by President Nixon before it was signed into law on September 26, 1973. (Pub. Law No. 93–112) Sen. Rep. No. 93–318, 93rd Cong., 1st Sess. Reprinted in 1973 U.S. Code Cong. and Ad. News 2076, 2086–2090. Section 504 was included in all three versions of the act.[1]

The intent to ban discriminatory policies and practices in order to assure equal opportunity to disabled citizens is evident throughout the legislative history. As part of the Senate Committee on Labor and Public Welfare's consideration of the Rehabilitation Act of 1973, it heard extensive testimony regarding the operation of covocational rehabilitation programs. The Senate report on the 1973 Act summarized the problems which were highlighted in these hearings including: "the lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, e.g., employment discrimination, lack of housing and transportation services and architectural and transportational barriers." Sen. Rep. No. 318, 93rd Congress, 2nd Sess. (1973), reprinted in U.S. Cong. and Ad. News at 2076.

Congress responded to this problem by enacting provisions prohibiting discrimination. There can be no doubt that Section 504 was intended to broadly ban discrimination. Senator Harrison Williams, chairman of the full Committee on Labor and Public Welfare and the leading sponsor of the Act summarized:

"The committee also found it necessary to place special emphasis on target populations whose needs were not being met, and to grapple with problems, which while not related solely to rehabilitation, pose serious problems for handicapped individuals in becoming employed, staying employed, and generally supporting themselves within their communities. In this respect, the committee payed (sis) special attention to the problems of employment discrimination, lack of housing and transportation facilities, and the prevalance of architectural and transportation barriers." Id. at 2457–2458.

Senator Alan Cranston, a primary sponsor of § 504 noted that simple extension of the existing 53-year-old Vocational Rehabilitation Act was not enough to insure equal opportunities for handicapped persons.

"(S)uch problems as unfounded discrimination in employment and in housing, difficulties of access to centers, and duplication and fragmentation of services across program lines were voiced repeatedly to the committee * * *" 119 Cong. Rec. 5882 (1973).

Moreover, it was recognized that discrimination had an especially detrimental impact on the vocational rehabilitation program.

As stated by Senator Cranston:

"(D)iscrimination in placement, hiring and advancement continues to limit the vocational rehabilitation program's ability to effect successful rehabilitations . . . The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to eliminate architectural barriers and provide substantial opportunities in employment for handicapped individuals." 119 Cong. Rec. S. 5882 (1973).

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[1] Prior to the inclusion of Section 504 in the Rehabilitation Act of 1973, attempts were made to include it as an amendment to Title VI of the Civil Rights Act of 1964. H.R. Rep. No. 12154, 92nd Cong., 1st Sess, 117 Cong. Rec. 45945, 45974–75 (1971) (introduced by Rep. Vanick); S. 3044, 92nd Cong., 2d Sess, 118 Cong. Rec. 525–26 (1972) (introduced by Senators Humphrey and Percy). The sponsors indicated a broad-based policy of nondiscrimination. See, eg. statement by Senator Percy:

"This landmark legislation, introduced by Congressman Vanik in the House, would prohibit discrimination against the mentally and physically handicapped in programs which receive federal aid.

"The amendment we are introducing today would . . . (guarantee) the handicapped equal opportunity to education, job training, productive work, due process of law, a decent standard of living, and protection from exploitation, abuse and degradation." 118 Cong. Rec. 526 (1972).

Senator Robert Taft, Jr. also emphasized the need for strong antidiscrimination provisions:

"The basic purpose of vocational rehabilitation continues to be to help physically and mentally handicapped individuals achieve the ability to work, earn, and live independently in their communities. Yet in spite of the relatively high success of this program, we still have a long way to go. . . . Too many handicapped Americans are not served at all, too many lack jobs, and too many are underemployed—utilized in capacities well below the levels of their training, education and ability. However, if we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all—discrimination." 119 Cong. Rec.

The Senate report which accompanied the final bill also reflected the broad remedial intent of Section 504. (S. Rep. No. 31, 9, 93rd Cong., 1st Sess. 6 (1973).

"[T]he committee strongly believes that all planning of buildings, public and private, transportation systems, communications systems and all public and private, transportation systems, communications systems and all public programs and services must make provision for the needs of handicapped individuals."

As expressed by Senator Jennings Randolph, "These (provisions) will help expand the vistas of opportunity for handicapped individuals across our land." 119 Cong. Rec. 24587 (1973).

The legislative history of the 1974 Amendments to the Rehabilitation Act further demonstrate Congressional intent to create a broad government policy prohibiting discrimination on the basis of handicap. As stated in the Senate Report:

"Section 504 was patterned after, and is almost identical to, the antidiscrimination language of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (Title VI) (related to race, color, or national origin), and Section 901 of the Education Amendments of the 1972, 42 U.S.C. 1683 (related to sex). The section therefore constitutes the receiving federal financial assistance shall be operated without discrimination on the basis of handicap." S. Rep. No. 93-1297, 93d Cong., 2d Sess., reprinted in (1974) U.S. Code Cong. & Ad. News 6373, 6390.

Senate Report No. 1139, 93rd Cong., 2d Sess. (1974) described Section 504 as covering a wide range of recipients:

"Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational rehabilitation services, in relation to federal assistance in employment, housing, transportation, education, health services or any other federally aided programs. Examples . . . are as follows: physically or mentally handicapped individuals who may be denied admissions to federally supported school systems on the basis of their handicap; handicapped persons who may be denied admission to federally assisted nursing homes on the basis of their handicap; those persons whose handicap is so severe that employment is not feasible but who may be denied the benefits of a wide range of federal programs; and those persons whose vocational rehabilitation is complete but who may nevertheless be discriminated against in Federally assisted activities."

Nor did Congress draw and distinction in the coverage of Section 504 that would look to the discretion of recipients of federal funds. Congress did not wish to give federal financial assistance to any recipient that discriminated on the basis or race, sex or handicap.

"The language of Section 504, in following the above-cited Acts further envision the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of federal financial assistance, attempts to bring noncomplying recipients into voluntary compliance through informal efforts such as negotiations, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of Section 504 would also include pregrant analysis of recipients to ensure that federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pregrant review procedures and a requirement for assurances of compliance with Section 504. Id."

The 1978 Amendments to Section 504 (Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978) added § (a)(2) which provides:

"The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1974 shall be available to any person aggrieved by any act or failure to act by any recipient of federal assistance or federal provider of such." [2]

Section 505(a)(2) was intended to give approval of and codify the 1977 HEW regulations See *Consolidated Rail Corporation* v. *LeStrange*, 104 S. Ct. 1248 (1984). In addition to the substantive regulations under § 504, HEW also had incorporated the administrative enforcement procedures under Title VI. 45 CFR Sections 80.6–80.10 and Part 81. The Senate Report states this intent:

"It is the committee's understanding that the regulations promulgated by the Department of Health, Education and Welfare with respect to procedures, remedies and rights under Section 504 conform with those promulgated under Title VI. Thus, (Section 505) codifies existing practice as specific statutory requirement." S. Rep. No. 890, a supra at 19, reprinted in (1971) U.S. Code Cong. & Ad News at 7312.

A review of the Title VI enforcement regulations make it clear that the existing administrative practice of HEW was to investigate claims of discrimination against recipients of federal funds.

45 CFR 80.7 Conduct of investigations

"(a) *Periodic compliance reviews.*—The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

"(b) *Complaints.*—Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

"*Investigations.*—The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent policies and practices of the recipient, the circumstances under which the possible noncompliance with this part occurred and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

"*Resolution of matters.*—(1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

"(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

"(e) *Intimidatory or retaliatory acts prohibited.*—No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Section 601 of the Act or this part, or because he has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder." (Sec. 601, 602 Civil Rights Act of 1964; 73 Stat. 262; 42 U.S.C. 2000d, 2000d-1) 29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17981, 17982, July 5, 1973).

The Title VI procedural regulations use the term program only when referring to the termination of federal funds. 45 CFR 80.8(c) provides:

Termination or refusal to grant or continue federal financial assistance.—No order suspending, terminating or refusing to grant or continue federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record after opportunity for hearing of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue federal financial assistance shall be limited to the particular political entity, or par thereof, in which such noncompliance has been so found.

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[2] The 1978 amendments also did the following: (1) broaden and strengthen the powers of the Architectural and Transportation Barriers Compliance Board; (2) expanded the coverage of Section 504 to include federal agencies and departments; (3) allowed reasonable attorney's fees to the prevailing party in actions brought under Title V; (4) clarified the term, "handicapped individual," as it pertains to the employment of drug addicts and alcoholics; and (5) made available remedies of Title VII for violations of Section 501.

Hence, Section 505(a)(2) simply codifies an earlier intention, expressed by Congress in 1974 and implemented in 1977 by HEW to provide the same procedures for enforcement of Section 504 as had been established for Title VI. The Senate Committee recognized that the 1977 HEW Section 504 procedural regulations, accomplished the goal of insuring "administrative due process and administrative consistency within the federal government. Sen. Rep. No. 890 supra at 19.

The above interpretation of Section 505 is wholly consistent with the overall intent of the other 1978 Amendments which was to expand the rehabilitation program, increase employment opportunities and reaffirm equal opportunity guarantees. In fact, the declaration of purpose was amended in 1978 to make the "guarantee of equal opportunity" an explicit purpose of the Act. 29 U.S.C. (Supp. III) 701; See H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 37 (1978).

The broad ban on disability-based discrimination by recipients of federal funds was also evident in the debates in 1978 concerning the extention of Section 504 coverage to the federal government and its agencies. As originally enacted, Section 504 was not explicit as to its coverage of the federal agencies. The 1978 amendments, added executive agencies and the United States Postal Service to the coverage of Section 504. As noted by Congressman Jim Jeffords:

"This amendment removes (the exemption for the federal government) and applies 504 to the federal government as well as State and local recipients of federal dollars . . . I think this is fair and appropriate and should go a long way toward developing a uniform and equitable national policy for elimination of discrimination." 124 Cong. Rec. H13901 (1978).

In debate on a proposal by Senator James McClure to limit a court, in an action against the federal government, to the provision of equitable and affirmative action remedies that would be proportionate to actual damages, the recipient as a whole was again viewed as the entity responsible for ensuring equal opportunity. 124 Cong. Rec. 30576. Senator Alan Cranston, a sponsor of the 1978 Amendment, vehemently opposed the proposed amendment arguing that the federal government should be required to do at least that which private employers are required to do. Id. at 30577-78. He stated that:

"The amendment offered by the Senator from Idaho would create an unwise and unrealistic distinction with respect to employment between the obligations of the federal government and the obligations of federal contractors and grantees. Ironically, the senator's amendment would limit with a financial test the federal government's obligation of being an equal opportunity employer. Federal contractors and grantees would—appropriately—cintinue to be required to equal opportunity employers." Id.

In conclusion, the legislative history demonstrates Congress' intent to ban all discriminatory practices and policies in all programs or activities operated by recipients of federal financial assistance. Any remaining doubt is dispelled by a review of the HEW § 504 regulations which were explicitly approved by Congress in the 1978 amendments 1978 amendments.

THE ADMINISTRATIVE REGULATIONS UNDER SECTION 504 PROHIBIT DISCRIMINATION BY RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE

In April, 1976 President Ford issued Executive Order 11914 instructing the Department of Health, Education and Welfare to implement Section 504 and coordinate Section 504 implementation by all other federal departments and agencies which extend federal financial assistance. HEW issued its 504 implementing regulations on May 4, 1977 (45 CFR Part 84).[3] Throughout this period, HEW evaluated over 850 public comments and the testimony from 32 public hearings. As the Supreme Court recognized in *Consolidated Rail Corporation* v. *Darrone*, supra "the responsible congressional committees participated in their (the regulations) formulation and both those committees and Congress itself endorsed the regulations in their final form." The HEW regulations have served as the model for all other agency regulations and follow the same framework.

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[3] When HEW was split into the Departments of Education and Health and Human Services the regulations were recodified but uncharged. The Department of Education 504 regulations now appear at 34 CFR Part 104.

The entire framework of the regulations revolves around the underlying position that all recipients of federal financial assistance from any source must assure nondiscrimination, access and equal opportunity in all of their programs, activities and operations. This is clear in the overview by HEW Secretary Joseph Califano which was published with the final regulations (42 Fed. Reg. 22676, 22677 (May 4, 1977). This overview is set forth below:

OVERVIEW OF REGULATION

"The regulation is divided into seven subparts. Subpart A (General Provisions) defines the terms that are used throughout the regulation and states in general terms the discriminatory acts that are prohibited. It also sets forth what the Secretary believes is a simple, workable system of administration: assurances of compliance, self-evaluation by recipients, establishment of grievance procedures, and notification of employees and beneficiaries of the recipient's policy of nondiscrimination on the basis of handicap. The regulation covers all types of physical and mental impairments, including drug addiction and alcoholism.

"Subpart B, dealing with employment practices, bars discrimination by recipients of HEW assistance in recruitment, hiring, compensation, job assignment and classification, and fringe benefits. It also requires employers to make reasonable accommodation to qualified handicapped applicants or employees unless it can be demonstrated that the accommodation would impose an undue hardship on the employer.

"Subpart C sets forth the central requirement of the regulation—program accessibility. All new facilities are required to be constructed so as to be readily accessible to and usable by handicapped persons. Every existing building need not be made physically accessible, but all recipients must ensure that programs conducted in those facilities are made accessible. While flexibility is allowed in choosing methods that in fact make programs in existing facilities accessible, structural changes in such facilities must be undertaken if no other means of assuring program accessibility is available.

"Subparts A, B, and C of the regulations as well as subpart G—which incorporates by reference the Department's procedures under Title VI of the Civil Rights Act of 1964—apply to all recipients of financial assistance from the Department. The remaining subparts of the regulation contain more specific requirements applicable to three major classes of recipients.

"Subpart D is concerned with preschool, elementary and secondary education. Its provisions have been closely coordinated with those of Education for All Handicapped Children Act of 1975 (Pub. L. 94-142). They require, basically, that recipients operating public education programs provide a free appropriate education for each qualified handicapped child in the most normal setting appropriate. The regulation also sets forth evaluation requirements designed to ensure the proper classification and placement of handicapped children, and due process procedures for resolving disputes over placement of students. While the Department does not intend to review individual placement decisions, it does intend to ensure that testing and evaluation procedures required by the regulation are carried out, and that the school system provide an adequate opportunity for parents to challenge and seek review of these critical decisions. And the Department will place a high priority on pursuing cases in which a pattern or practice of discriminatory placements may be involved.

"Subpart E deals with post secondary education. It proscribes discrimination against handicapped persons in recruitment, admission and treatment after admission. Colleges and universities are required to make reasonable adjustments to permit handicapped persons to fulfill academic requirements, and to ensure that they are not effectively excluded from programs because of the absence of auxiliary aids. Groups of colleges may not establish consortia exclusively for handicapped students.

"Finally, Subpart F deals with health, welfare and other social service programs. It forbids discrimination in providing such services and requires larger recipients to provide auxiliary aids to handicapped individuals where necessary. Specific provisions require hospitals not to discriminate against addicts or alcoholics who need medical services and to establish emergency room procedures for communication with persons with impaired hearing. Under Subpart C, health and social service providers amy satisfy their program accessibility obligations with respect to existing facilities by arranging to meet beneficiaries in accessible locations. In addition, small providers may refer patients or other beneficiaries to accessible providers as a "last resort" alternative to making significant structural changes."

The regulations place the responsibility on the recipient of federal funds to assure nondiscrimination through adherence to the substantive provisions set forth in the regulations. Recipient is defined as:

34 CFR § 104.2(f) provides: "'Recipient' means any state or its political subdivision, any instrumentality of state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance."

The regulations explicitly cover the recipient as a whole, including its component parts. Hence, for example, § 104.31 states that—

"Subpart D applies to preschool, elementary, secondary and adult education programs and activities that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities."

In fact the regulations are rendered meaningless and unworkable after the *Grove City* decision.

Following the above example, the regulations require a recipient to educate "each qualified handicapped person in its jurisdication" with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person (§ 104.34(a)). If the *Grove City* decision is interpreted to divide a school system into discrete and separate "programs" with some covered and others free to discriminate, the mainstreaming requirement of the regulations could be avoided. The child could be protected by § 504 while participating in the special education program but be subject to discrimination, including exclusion from regular education programs if the regular classes did not directly receive federal funds. The special education "program" would not even have the authority to assure the child's participation in regular education classes, while the recipient clearly does. The regulations further require that "a recipient shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." Nonacademic and extracurricular activities are defined to include—

"Counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment." § 104.37(2)

Obviously this provision, so critical to full integration of disabled children in schools would be rendered meaningless if each separate activity would have to directly receive federal financial assistance to be covered by § 504.

Likewise the regulations view post-secondary education recipients as a whole and as a sum of their component parts. §104.41 provides:

"Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities that receive or benefit from federal financial assistance for the operation of such programs or activities."

Again, the regulations would be wholly ineffective if each "program" of a university was viewed separately with antidiscrimination coverage dependent on whether it directly received federal funds. For example, the regulations provide that "a recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others." 34 CFR 104.45(a). This provision would be useless after *Grove City* if the university demonstrated that no federal funds were used directly in its housing program. Even more fundamentally, students applying for admission in or enrolling in colleges which directly receive federal funds would be protected by § 504 while those in colleges not directly funded would not, even though both colleges are part of a university which receives substantial federal assistance. A student pursuing a career in secondary education with a major in political science could be admitted to the School of Education because it receives federal funds but be precluded from taking courses in political science, because college does not receive federal funds. The regulations forbid this result.

34 CFR 104.43(c) states that:

"A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity."

The official HEW analysis of the regulations states why this section was deemed necessary:

"Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its educational program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job in the area in question for a person with that handicap." 42 FR 22692 (May 4, 1977).

Hence, the hypotheticals referred to above are not merely imaginary.

The damaging results of *Grove City's* narrow program or activity restriction is particularly evident in the area of employment. Once again the regulations put the responsibility of equal employment opportunity and reasonable accommodation on the recipient of federal funds. In determining whether an accommodation is reasonable the regulations set forth factors to be considered, such as the "overall size of the recipients program with respect to the number of employees, number and type of facilities and size of budget" and the "type of the recipient's work force." (34 CFR 104.12(c)). The word program is clearly used in this context to refer to the recipient's overall operations.

The Supreme Court has recently resolved a five-year controversy among the Federal Circuit Courts on Section 504's employment coverage. Relying on the incorporation into §504 of the rights, remedies and procedures under Title VI in the 1978 amendments, several Circuits[4] held that the limitation contained in Title VI (§602) for employment coverage to only those instances where a primary purpose of the federal funds is to provide employment applied to Section 504 as well.

In a unanimous decision, the *Supreme Court* v. *Consolidated Rail Corp.* v. *Darrone, supra,* held that Section 504 covered employment regardless of the purpose of the federal funds. The court stated that HEW, "from the outset has interpreted that section to prohibit employment discrimination by all recipients of federal financial assistance, regardless of the primary objective of the aid." And as noted earlier, the Supreme Court stated that these regulations "particularly merit deference because Congress "participated in their formulation," and "endorsed the regulations in their final form."

The *Darrone* decision, of course, represented an important victory in disability civil rights law under §504. The irony is that the *Grove City* decision issued the same day threatens to substantially curtail the effect of this victory. After *Grove City,* a disabled person's right to equal employment opportunity would be uneven at best. For example, a disabled professor could apply for employment in the English department of Grove City College and be flatly refused on the basis of disability. Equal employment opportunity would only be guaranteed in the student financial aid office. "Likewise, a disabled person's right to be free of discrimination could turn on the particular program of the university for which employment is sought. All disabled law professors could be banned so long as the law school is not in direct receipt of federal funds. The very purpose of the 1973 Rehabilitation Act was to "promote and expand employment opportunities for handicapped individuals * * *" 87 Stat. 357, 29 U.S.C. §701(8). The legislative history is replete with statements stressing the importance of equal employment opportunity to the ultimate goal of the 1973 Rehabilitation Act—the integration of disabled citizens into the American mainstream.[5] The narrow interpretation of program or activity is inconsistent with the intent of Congress recognized in *Darrone* to broadly prohibit employment discrimination by recipients of federal funds.

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[4] *United States* v. *Cabrini Medical Center,* 689 F2d 908 (2d Cir. 1981); *Trageser* v. *Libbie Rehabilitation Center,* 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979); *Carmi* v. *Metropolitan St. Louis Sewer District,* 620 F.2d 672 (8th Cir.), cert. denied, 449 U.S. 892 (1980); *Scanlon* v. *Atascadero State Hospital,* 677 F.2d 1271 (9th Cir. 1982). *Contra; LeStrange* v. *Consolidated Rail Corp.* 687 F.2d 767 (3d. Cir. 1982), *Affirmed* 104 S. Ct. 1248 (1984); *Jones* v. *MARTA,* 681 F.2d 1376 (11th Cir. 1982).

[5] Such problems as unfounded discrimination in employment and * * * difficulties of access to places of work * * * were voiced repeatedly in committee. * * * (D)iscrimination in placement, hiring and advancement continue(s) to limit the vocational rehabilitation program's ability to effect successful rehabilitations. (119) Cong. Rec. 5882 (1973) (Cranston). Too many handicapped Americans * * * lack jobs, and too many are underemployed * * *.

(I)f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all—discrimination. 119 Cong. Rec. 24587 (1973) (Taft)

The negative and illogical effect of the *Grove City* decision on § 504's employment coverage is well illustrated in a case currently pending before the Department of Education. The Department of Education, after investigation found that Lauderdale County, Alabama school district refused to rehire a handicapped teacher who has lupus "solely on the basis of her handicap." The Lauderdale school district filed a response arguing that the *Grove City* decision strips OCR of any jurisdiction because the teacher taught math and physical education and neither of these "programs" received federal funds. 17 Education Daily, p. 4 (April 11, 1984).

The examples demonstrating the probable negative effects of the Supreme Court's narrow "program or activity" holding in *Grove City* are endless. The Section 504 regulations after much deliberation and explicit approval by Congress require recipients to assure nondiscrimination in all of their operations. Any other formulation of the antidiscrimination mandate would be unworkable and ineffective and would render the promise of equal citizenship for disabled Americans hollow indeed.

The Civil Rights Act of 1984 is Necessary to Reaffirm Congressional Intent that Section 504 Assure Equal Opportunity by Prohibiting Discrimination by All Recipients of Federal Financial Assistance.—Section 504, more than any other piece of legislation, is looked upon by disabled Americans as the hallmark of this nation's commitment to integration and equal opportunity. Congress extended a promise of nondiscrimination, as yet unfulfilled. However, in the ten short years since its enactment § 504 has opened doors which the *Grove City* decision threatens to close once more. The benefits of nondiscrimination are realized by disabled citizens, the direct beneficiaries of § 504 but by the society as a whole. Equal opportunity is not only a moral and legal imperative, it is a good investment in the future.

For example, the Supreme Court recently recognized in *Consolidated Rail Corporation* v. *Darrone, supra,* that Congress was acutely aware that a strong national policy of antidiscrimination was necessary to open employment opportunities to disabled Americans. Disabled people face staggering unemployment rates. Unemployment has currently been estimated to be between 50 and 75% by the President's Committee on Employment of the Handicapped.[6] Furthermore, studies indicate that only in a tiny percentage of cases is inability to perform a regular, full-time job the reason a disabled person is not employed.[7]

A comparison between the studies on employer's attitudes and the studies on the actual performance of disabled workers demonstrates a large discrepancy between the perceived incapacity and the actual incapacity of disabled applicants and workers.[8]

The cost of employment discrimination is tremendous to disabled individuals and to society at large. In a major study commissioned by the Office of Civil Rights, HEW, it was estimated that eliminating discrimination against handicapped people in HEW-funded grant programs would yield $1 billion annually in increased employment and earnings for disabled people.[9]

In addition to increasing the gross national product, it has been estimated that such an earnings increase by handicapped workers would result in some $58 million in additional tax revenues to Federal, State and local government.[10]

Similarly, studies indicate that equal educational opportunities yield substantial economic benefits by reducing the need for institutionalization, increasing future earnings, and decreasing the need for public assistance. For example, in 1976 HEW estimated that expansion of special education services pursuant to the requiremens of section 504 of the Rehabilitation Act would result in an annual increase of $1.5

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[6] Handicapped Rights and Regulations, Vol. 4, No. 7 (April 5, 1983), p. 49.

[7] See, e.g. Berkeley Planning Associates, Final Report: Analysis of Policies of Private Employers Toward the Disabled (prepared under HHS contract) (Nov. 1981), p. 413

[8] See Brief of Amici Curiae American Council for the Blind and Sixty Two Other National, State and Local Organizations Dedicated to Promoting the Civil Rights of Disabled Persons in *Consolidated Rail Corporation* v. *LeStrange Darrone,* in the Supreme Court of the U.S., Oct. Term, 1982.

[9] *Discrimination Against Handicapped Persons: The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance,* 41 Fed. Reg. 20, 232 (1976). See, Note, "Mending the Rehabilitation Act of 1973," p. 727.

[10] S. Rep. No. 318, 93d Cong., 1st Sess., reprinted in 1983 U.S. Code Cong, & Ad. News 2076, 2086; 119 Cong. Rec. 24,586 (1973) (Statement of Sen. Cranston). These 1973 estimates were based upon a minimum 5 percent of income tax rate. By 1978 the estimated rate had already risen to 6 percent See H.R. Rep. No. 1149, 95th Cong. 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 7320.

billion in adulthood earnings of the additional handicapped children served.[11] The results of equal access to higher education is similar. One study estimated the rate of return on investiments in higher education for disabled students to be between 14 and 17 percent, about the same or a little higher than the return for nondisabled students.[12] However, the estimated rate of return for society was shown to be 31 and 40%, more than twice the social return on investment in the education of nondisabled.[13] The reason for the discrepancy is that a college education not only widens job opportunities but also often marks the difference between a life of unemployment and dependency and one of economic and social independence.[14]

A thorough review of the benefits of nondiscrimination in all areas covered by Section 504 is presented in a recent publication of the United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, Clearinghouse Publication 81, September 1983.

Congress' well documented intention in 1973 to extend the guarantee of equal opportunity to disabled Americans by assuring that the federal funds do not contribute to or promote discrimination would be drastically curtailed by the *Grove City* decision. If an agency provides funds to an institution it should have the right to investigate any claims of discrimination. The appropriate remedy, should discrimination be found and conciliation efforts fail is a different matter. The agencies power to terminate or discontinue assistance is tailored to the particular circumstances involved in an individual case. If termination of federal funds is not an appropriate remedy because the assistance does not support the discrimination, the agency may resort to "other means authorized by law," such as referral to the Attorney General to bring a suit to address the actual discrimination involved in the case. In addition, the claimant could pursue his/her discrimination claim through a private right of action in court. Most often in the case of §504, agency intervention results in needed technical assistance on the most efficient means of complying with the law and results in voluntary compliance (See attachment B). Termination has never been ordered by any administrative agency but it continues to provide a vital role in maintaining the strength of Section 504 enforcement.

Once again, disabled Americans look to Congress to reaffirm the basic principles of integration and equal opportunity through a clear and straightforward clarification of its original intent. We are confident that this nation's commitment to disabled citizens which was firmly established in 1973 will not be abandoned.

Chairman **Perkins**. Thank you. Mr. Herbert O. Reid.

STATEMENT OF HERBERT O. REID, SR., CHARLES HAMILTON HOUSTON PROFESSOR OF LAW, HOWARD UNIVERSITY, WASHINGTON, DC

Mr. **Reid**. I am Herbert O. Reid. Chairman Perkins, Chairman Edwards, and members of the joint committee, it is a pleasure to appear before you again today in support of H.R. 5490. I have a prepared statement which has been submitted to you.

Chairman **Perkins**. Without objection, it will be inserted in the record.

Mr. **Reid**. Further, I would like to supplement that written statement in light of some of the discussion this morning with Mr. Reynolds and some of the questions in a period of 2 or 3 days.

Chairman **Perkins**. Without objection.

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[11] *Discrimination Against Handicapped Persons: The Cost, Benefits and Inflationary Impacts of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance, 41 FR 20365 (1976).* See also Ronald Conley, *The Economics of Mental Retardation* (Baltimore: John Hopkins Univ. Pres, 1973), pp. 296–300; L.J. Schweinhart and D.P. Weikart, "Young Children Grown Up: The Effects of the Perry Preschool Program on Youth through Age 15" (Ypsilanti, Minn.: High Scope Educational Research Foundation, 1980). See also Discrimination Against Handicapped Persons Cost Study, 41 FR 20312, 20338–60 (1976)

[12] Charles H. Blake, Michael J. Cleary, Louis Quatrano. The Psychological and Economic Impact of Wrigtht State University's Handicapped Student Services Program, Wright State University, Dayton, Ohio 1977.

[13] Id. pp. 58–59.

[14] For a review of the relatively insignificant costs in accommodating disabled student in higher education see, Daniel Finnegan, *Disabling the Disabled: Discrimination in Higher Education*, Lawrence Hall of Science, University of California at Berkeley, pp. 13–14.

Mr. **Reid**. I would like to spend the time highlighting the importance of title VI and the need for this amendment, H.R. 5490. In terms of title VI, Congress is exercising two separate distinct powers which are very great. First in terms of effectuating the intendment of the 14th amendment, Congress has exceptional power.

Likewise, Congress has exceptional power in determining how Federal funds shall be spent and opted. In terms of that, there is case law which I think bears on some of the questions raised and some of the squares thrown up—in terms of the intendment of the 14th amendment. There are a number of cases, sir, which deal with the question of purely, purely private action, impressed with the 14th amendment duty.

The reason I bring that up—the courts have had to go into the impact of private action in terms of the whole operation of the community and the important considerations in the community, in order to determine whether or not the scope of the 14th amendment ought to be extended and applied to that.

And in that, of course, is the term, "reasonableness," and reasonableness of its application.

Likewise, in terms of other areas of—the new term, "recipient,"—Congress would never be able to legislate without the necessity for interpretation. That is why we have administrative officials; that is why we have the courts. That is why we had the *Grove* case. So you can postulate for every possibility that may arise.

But common sense, reasonableness, has been a guide in our jurisprudence and has served us well and it serves us well today in terms of the imapct of H.R. 5490. It still will be an important distribution, what the court dealt with in the *Grove* case, as indirect and direct. Also other considerations would be involved.

What I am trying to suggest, sir, in my 37 years of professional experience, I have been before both chairman from time to time asking that we inch forward. I am here today asking that we please not inch backwards and that we pass H.R. 5490 in terms of making sure that title VI is an effective weapon as Congress initially intended that it would be. Thank you.

Chairman **Perkins**. Thank you.

[Prepared statement of Herbert O. Reid, Sr. follows:]

PREPARED STATEMENT OF DR. HERBERT O. REID, SR., CHARLES H. HOUSTON DISTINGUISHED PROFESSOR, HOWARD UNIVERSITY SCHOOL OF LAW, WASHINGTON, DC

Mr. Chairman and members of the Joint Committee, I am Herbert O. Reid, Sr., Charles H. Houston Distinguished Professor of Constitutional Law, Howard University, here in Washington, D.C. I appear before you today to join the voice of Congress, scholars, citizens and supporters of the United States' constitution urging the swift passage of H.R. 5490, the Civil Rights Act of 1984, to restate and once again codify the law of the land to the effect that federal assistance shall not be used to unlawfully discriminate on the basis of race, color, national origin, sex, handicap or age.

As both a teacher and litigator, I have explored the scope of the Civil Rights law of 1964. As stated in my amicus brief in *Adams* v. *Richardson,* 351 F.Supp. 636, aff'd 480 F.2d 1159 (D.C. Cir. 1973), the conditions which caused the restatement and codification of the law of the land exist today. Quoting from Dr. Andrew Billingsley and Jeanne M. Giovanni:

"None of the institutions of the larger society work as well for Black people as they do for white people. They were not designed to do so. This is true of all the major institutions without exception. Of course, there is some variation; some institutions function worse for Black people than do others. But whether we think of education, health services, the communications media, religion, law enforcement, or any other dominant system of the larger society, we see white racism at work. It is this force more than any other which makes Black children, Black families, and Black communities specially vulnerable to the vicissitudes of life; and it is the major cause of the wide-spread and continuing poverty within the Black community. The combination of racism and poverty caused and maintained by the institutions of the larger society is, we contend, primarily responsible for the stormy past, present, and future of Black children in need." Dr. Andrew Billingsley, Jeanne M. Giovanni, *Children of the Storm* (Harcourt-Brace-Jovanovich, Inc., 1972).

It was the recognition of the inequality still extant which led to the passage of the benchmark Civil Rights Act of 1964. Title VI and its implementing regulations is the model for Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

It would be disingenuous to claim that Title VI has been vigorously enforced, quite the contrary, for 20 years through Republican and Democratic Administrations too often taxpayers and citizens were compelled to ask the federal Courts to declare the undisputed mandates of the Civil Rights Act and the implementing regulations (*Adams*, supra, regarding HEW), *Brown* v. *Weinberger*, (1976) (HEW), *Young* v. *Pierce*, (1980) (HUD), but for twenty years there was no dispute as to the scope of coverage.

In *U.S.* v. *El Camino Community College*, the Court held that HEW had the mandate and duty to investigate institution-wide to assure compliance. In *Lau* v. *Nichols*, 414 U.S. 563 (1964) the issue was the Special English Language needs of Chinese Students; the scope of inquiry was the entire San Francisco School District. In *Flanagan* v. *President & Directors of Georgetown College*, 417 F.Supp. 377 (D.D.C. 1976) the entire law school was affected because the school is housed in a structure built with federal financial assistance. In *Bob Jones University* v. *Johnson*, 396 F.Supp. 596 (S.C. 1974), aff'd per curiam, 529 F.2d 514 (1975) the entire university was affected as a recipient of federal financial assistance when its students received Veteran's Administration assistance. See also *Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068, 7079, (5th Cir. 1969) ("infection theory").

The gravamen of the purpose and scope of Title VI was stated by Senator Hubert M. Humphrey quoting President John F. Kennedy:

"Simple justice requires that public funds to which all taxpayers of all races contribute, not be spent in any fashion, which encourages subsidizes or results in racial discrimination." 110 Cong. Rec. 6543 (1964).

REGULATIONS

The validity of the regulations implementing Title VI also have been over the years often, but unsuccessfully, challenged. As recently as 1983, the Supreme Court stated that the scope of Title VI clearly incorporates the regulations. *Guardian Association* v. *Civil Service Commission of the City of New York*, — U.S., — (1983).

As stated in *Guardian*, a Presidential Task Force was formed to produce model Title VI regulations. Every Cabinet department and about 40 federal agencies adopted the regulations. In many court challenges they were held to be within the scope of Title VI. *Lau*, *supra*, *Fullilove* v. *Klutznich*, 448 U.S. 448449, 100 S. Ct. 2758, 2775, 65 L.Ed. 2d 902 (1980).

TERMINATION

The "sound and fury" attendant passage of the 1964 Civil Rights Act was well illustrated regarding the debate surrounding the termination of funds provisions. This "extreme sanction" to achieve the Congressional intent, the school desegregation case showed, was most useful as a threat which aided the voluntary compliance of dilatory recipients of federal financial assistance to stop unlawful discriminatory acts. The principle is simple as regards Title VI:

"Congress specified one Constitutional command, a prohibition of racial discrimination which those engaging in federally financed projects *must* respect. *Wahba* v. *New York University*, 429 F.2d. 96 (2d Cir. 1974) Cert denied, 419 U.S. 874, 95, S. Ct. 135, 42 L.Ed. 2d. 113. (Emphasis added.)

The termination section with the "pinpoint provision" in Section 2000d-1(1) is in no way intended to limit the coverage of Section 2000d.

As Chief Judge Justice stated:

"It is axiomatic that statutes will be read in such a manner that the various provisions are complementary and harmonious. To read Section 2000d-1 * * * (Terminations) * * * as a limitation on the very rights that are protected by the previous section would violate the principle, and would also traduce elementary canons of logic." *Young* v. *Pierce*, 544 F.Supp. 1010, 1016 (1982).

And so today, twenty years after enactment of the restatement of the law of the land, twenty years of consistent, court sanctioned interpretation regarding the assurance of compliance, we must reiterate. The holding and effect of the *Grove City College* decision mandates Congress without equivocation stating, to paraphrase:

"The purpose of this legislation is to eliminate the vestiges of unlawful segregation, root and branch, from our society." (*Young* at 1023.)

The need to state our nation's commitment to equality is dire today as it was 20 years ago.

I need not remind you of the climate creating the urgency for the 1964 Civil Rights Act. Three students were murdered, churches were bombed, the cities of the north were exploding with riots, the climate was of death and destruction because Americans were seeking equal access to voting booths, schools, lunch counters, and jobs.

The frustrations of 20 years ago have not been assuaged. The hatreds have not totally been erased. The storm has abated but not ceased. There is still the urgency to end discrimination for the good of all Americans.

I urge you to swiftly re-affirm our Constitution, our values and our principles.

Chairman **Perkins**. Our next witness is Ronald T. Vera, Mexican American Legal Defense and Education Fund, San Francisco. Go ahead.

STATEMENT OF RONALD T. VERA, ESQ., MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, SAN FRANCISCO, CA

Mr. **Vera**. Chairman Perkins, Chairman Edwards, thank you for allowing me to testify here today.

I would like to put MALDEF's comments in perspective, because it was 1 year ago this week that members of this committee held hearings on civil rights enforcement in higher education. And at that time MALDEF, along with a variety of other witnesses, testified about civil rights enforcement in higher education and what would happen to access for minority students in higher education if the Department of Justice's proposed policies in Grove City would take effect.

And today we are sitting here with the knowledge that the Supreme Court has accepted the Department of Justice's interpretation of title VI, title IX, section 504, and virtually every civil rights law, creating the anomalous situation that an educational institution can engage in discrimination, but nevertheless can cut off funds to that specific program or activity that is engaging in discrimination, while the entire educational institution can go on as it pleases.

To that end, we support H.R. 5490, because if we don't enact H.R. 5490, as witnesses have just said, we are going to go back to 1964 and we are going to have to look at Congress' intent once again. And I don't think we have to do that. I think Congress' intent is virtually clear. And I think with passage of H.R. 5490, we let the Justice Department and the Department of Education know where civil rights enforcement now stands.

Let me also say that MALDEF and virtually every civil rights organization has proceeded on the assumption that civil rights coverage goes to recipients and not necessarily to the program or activity. And for that reason, if you look at the court cases that have been decided in the education setting, virtually every major case in the past 15 years dealing with increased access for students in education have proceeded under title VI going to the recipient rather than to the program or activity.

In response to Mr. Reynolds' statement earlier that more litigation would arise because of H.R. 5490, I would say in agreement with the other witnesses, that unless H.R. 5490 is enacted, that we are going to be going back into the courts with virtually every case that we now have in the docket dealing with title VI.

Let me give you one example. MALDEF is presently cocounsel in the case of *Adams* v. *Bell*. And one of the cases that we are dealing with deals with the enforcement of title VI in Texas colleges and universities. The situation with respect to Texas has been laboring in the Department of Education since 1978 when the department was ordered by the judge to go into Texas and take a look at the segregation occurring in Texas and the under representation that was occurring with respect to his paying students.

It has been now 5 years and we still have yet to receive a final decree from the Department of Education with respect to Texas colleges and universities. I can well imagine that if the *Grove City* decision was raised by Texas, that it is conceivable that the court could throw out 5 years of effort with respect to what is happening in Texas and that the only institutions or programs that would be covered in Texas would be the very narrow financial aid programs that are covered by Texas public institutions. And we would not be able to reach the main issues we are dealing with. And that is admissions, retention, the transfer of students from black colleges to white and the elimination of under representation for Hispanic students in Texas.

That is just one example, if we don't enact H.R. 5490. Let me give you another example. That is if we don't enact H.R. 5490, this department is going to take that narrow interpretation and only look to the specific programs or activities that are federally funded and ignore every case of discrimination that may be occurring in educational institutions today.

We need this bill and we need it now, because if we don't get it, we are going to be going into court on virtually every case with the Department of Education and the Department of Justice, because it is laboring under a very narrow interpretation of civil rights laws. And they are the only body that is laboring under this interpretation.

We have heard now testimony for the past 4 or 5 days, and everyone is in agreement as to what Congress intended to do. And I think it is incumbent upon the Members of the Congress to make it perfectly clear to this administration what it intended to do in 1964 and every time it enacted a civil rights law.

Thank you.

[Prepared statement of Ronald T. Vera follows:]

PREPARED STATEMENT RONALD T. VERA, DIRECTOR, ACCESS TO HIGHER EDUCATION PROJECT, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, SAN FRANCISCO, CA

Chairman Perkins, Chairman Rodino, and members of the Committees, my name is Ronald Vera, and I am staff counsel with the Mexican American Legal Defense and Educational Fund. Thank you for inviting me to testify here today. In addition to being staff counsel with MALDEF, I am director of a project within MALDEF called the Access to Higher Education Project. Since 1978, our Project has attempted to address the enforcement of civil rights for Hispanics in higher education. Many of our recent efforts have brought MALDEF to the forefront of civil rights litigation for Hispanics in higher education.

DECLINE IN CIVIL RIGHTS ENFORCEMENT

It is ironic that we are gathered here today to provide testimony on the need to consider H.R. 5490 since members of both Committees held hearings approximately one year ago this week on the problems of higher education civil rights enforcement. MALDEF, along with several other witnesses, provided a sad legacy as to the inadequate civil rights enforcement in higher education. When MALDEF testified one year ago, we reported that civil rights enforcement under title VI was characterized by excessive delays, insufficient resources, and efforts too often characterized as neglectful in enforcing federal laws to provide equal educational opportunity in our nation's schools. What is different today is that the narow and lax policies being proposed by the Departments of Education and Justice have indeed been adopted by the United States Supreme Court in *Grove City* v. *Bell*. There is no doubt that unless Congress clarifies and strengthens its original interpretation of our civil rights laws that civil rights enforcement, as we now understand it, would become meaningless.

CONSEQUENCES OF THE GROVE CITY DECISION

Today, I would like to address several instances that exemplify how the *Grove City* decision would have an inexcusable and detrimental impact on equal opportunity for minority students in education.

Since 1967, MALDEF has initiated litigation based on the premise that title VI of the 1964 Civil Rights Act prohibits federal aid to any educational institution that discriminates on the basis of race or national origin in any of its programs. Based on this premise, MALDEF, on behalf of Hispanic students, has undertaken a wide variety of cases that have utilized title VI as an effective enforcement tool. These cases have coverd a broad spectrum of discriminatory practices in education. They include the areas of student admissions, student services, testing, counseling, and hiring of faculty and staff. If such cases had been filed after the *Grove City* decision, virtually every case would have been dismissed or cited by the federal government as having no jurisdiction under which to proceed.

Let me cite six examples of cases brought by MALDEF, some on an of-counsel basis, that could not have achieved the same results if filed after the *Grove City* decision.

In school segregation against Hispanic students, for example, we relied on title VI in *Morales* v. *Shannon*, 516 F. 2d. 411 (5th Cir. 1975) and *Castaneda* v. *Pickard* F. 2d. (5th Cir. 1981) to effectively prohibit a wide range of discriminatory practices against Hispanic students.

In terms of providing educational services to non or limited English speaking children, we achieved title VI victories in *Serna* v. *Portales Municipal Schools*, 499 F. 2d. 1147 (10th Cir. 1974) and *Idaho Migrant Council* v. *Idaho* 647 F. 2d. 697 (9th Cir. 1982).

With respect to discriminatory testing practices, we used title VI to curb I.Q. testing in California schools (*Diana* v. *Riles*, consent decree); and in a similar fashion we achieved several significant compliance agreements with the Department of Education and third party educational institutions based on the fundamental notion that federal funding shall not go to an institution that engages in discriminatory practices.

Probably one of the most significant cases that we are involved in with other counsel, and which uses title VI as an enforcement tool, is *Adams* v. *Bell*. While I am sure that the majority of the members of both Committees are familiar with the history of *Adams*, I would like to offer a brief example of how the *Grove City* decision, unless reversed by Congress, would undermine the years of effort that have gone into *Adams*. In 1975, MALDEF intervened in the *Adams* case on behalf of Hispanic students to ensure that no title VI funds would go to those institutions found to engage in discriminatory practices against Hispanic students.

Pursuant to the orders issued in *Adams* v. *Bell*, in 1978 the Department of Education undertook a Title VI compliance review among Texas higher education institutions. For two years, the Department of Education reviewed every public college and university that received federal funds. Based on this review, the Department of Education found continued segregation of Black students and severe underrepresentation of Mexican American students in every public college in Texas and pursuant to Title VI, Texas agreed to undertake a major overhaul of its higher education system. In 1982, every federally funded higher education institution made a promise to the Department of Education to eliminate the segregation and underrepresentation of minority students. Moreover, Texas, as a whole, promised that within 10 years true equal opportunity would be achieved for every minority student. This sweeping promise, which MALDEF intends to enforce, was only made possible by the original congressional intent that once an educational institution receives Title VI federal funds the entire institution is obligated to ensure that every program and activity within that institution does not discriminate. Had the *Grove City* decision been handed down seven years ago, the Department of Education would have proceeded into Texas scrutinizing only those programs or activities that received federal funds and the state of Texas would never have undertaken those remedies to eliminate discrimination. We would not see the promises to eliminate segregation or underrepresentation of minority students and we would not have reached the issues of admissions, retention programs, or transfers of students that truly affect educational opportunity for all minority students and could not have been reached under the *Grove City* decision.

When the *Grove City* decision was to be heard by the Supreme Court, MALDEF failed an amicus brief on behalf of 13 major Hispanic organizations involved in education issues. Our brief voiced the concern that adoption of a "program specific" policy under Title VI would effectively create an "accounting" system within higher education that would prohibit the Department of Education from eliminating discrimination in higher education institutions. In effect, we argued that civil rights enforcement in education will be deterred from the start if the Department of Education has to prove its jurisdiction before bringing enforcement proceedings. With the *Grove City* ruling, our worst fears are confirmed.

Moreover, MALDEF believes there is a great possibility that the *Grove City* ruling could be applied beyond Department of Education's jurisdiction. For example, health care, municipal and social services, and other federally assisted areas are also subject to similar Title VI compliance reviews. MALDEF has also brought cases in these areas using Title VI as a remedial tool. If the *Grove City* principle is adopted as nationwide policy by the Department of Health and Human Services, the Department of Transportation and other departments, it would dissipate civil rights protection. We know that the Attorney General has attempted to discount the policy implications of the decision in *Grove City*, but given the sad testimony of civil rights enforcement we do not agree.

CONCLUSION

We believe that if the *Grove City* ruling is allowed to continue, litigation decisions issued by the Attorney General would only be done on a program-specific basis and would not reflect Congress' original intent to prohibit discrimination in recipient institutions of federal financial assistance. MALDEF continues to believe that Title VI of the 1964 Civil Rights Act, as originally proposed and enacted by Congress, can and should prevent the flow of federal financial funds to those education institutions that engage in discriminatory practices. Without recipient-based coverage it will be impossible to provide individuals effective protection against civil rights violations. MALDEF believes that this is in fact what Congress intended. We fear, however, that unless Congress enacts H.R. 5490 promptly, there will be further delays in achieving equal opportunity for students in our education system. I appeal to the members of the Committee to endorse H.R. 5490 as proposed without amendment and to take the steps necessary to ensure that this important law is enforced to its fullest extent by the executive branch.

Chairman PERKINS. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. I want to thank these witnesses. They have really been very valuable.

Mr. Reynolds, this morning, said that—came out against the bill and said that if the bill was enacted and *Grove City* decision was done away with by legislation, that it would result in a real bureaucratic mess. Do you think that is true? Who would like to answer that?

Ms. GREENBERGER. I would be happy to start.

I think the opposite, in fact, is true. Right now we have an enormous bureaucratic mess, and that is about the nicest word I can think of to describe it at the moment. Right now we have a situation where if the Department of Education intends to do its job, it has to start figuring out every dollar of Federal funding that is going to every institution, where it is going, going through all of their books and records first to figure out what is covered.

Then and only then does it move on to investigate and get to the business at hand of figuring out where the discrimination is.

So we have the potential of agency resources, which are so scarce and so precious, being diverted from looking at problems of discrimination into looking at financial records of covered institutions.

Second, we have a situation where, as we have all discussed, the limits of the *Grove City* decision are yet to be resolved, and therefore there will be conflicting views, no doubt, between beneficiary groups and the government and covered institutions about what the nature of their responsibilities are, and whether or not they have any responsibilities to comply to begin with.

So there will be enormous amounts of money, time, resources and energy devoted to the question of whether they have to stop discriminating, diverted from the business of looking at whether there is discrimination, and if there is, how best to cure and remedy it.

Mr. **Edwards**. That is very helpful. Thank you.

Mr. **Jeffords**. I just have one question which can be simply answered either by a nod of the head, or if anybody doesn't agree with it, raise their hand and say so.

I presume you have all looked over the bill. I would like to know as to whether or not the bill in its present form is acceptable for your purposes.

If the answer to that is yes, you can all nod "yes." And if anybody disagrees, raise their hand, and I will ask you a question.

Everybody agrees. Fine. Thank you.

That is all I have.

Chairman **Perkins**. Mr. Sensenbrenner.

Mr. **Sensenbrenner**. Mr. Chairman, there have been some allegations made that this bill goes a lot further than a lot of the authors of the bill indicate, as to which institutions get covered by the provisions of this bill, title IX and the other sections of the bill.

I would like to just ask a couple of very quick questions—if you will agree if an institution is covered or not.

For example, what about the institution that receives no Federal funds directly or accepts students who receive either Pell Grants or Basic Educational Opportunity Grants, but it does accept students who pay for tuition with guaranteed student loans.

In your opinion, would this legislation cover those institutions?

Ms. **Greenberger**. I think that this particular legislation does not change the answer to that question. It leaves it as it has always been.

I personally think that guaranteed student loans in fact do constitute Federal financial assistance. When title IX was passed, in the House report there was a list of all the Federal funding statutes that were considered to be covered, guaranteed student loans were included. Agency regulation interpretations have always considered guaranteed student loans to be covered.

Mr. **Sensenbrenner**. We are running out of time, so let me ask a couple more questions.

How about the student who gets part of his tuition money from a parent who is a Federal civil servant; does this bill cover them or not?

Mr. **Vera**. I don't think so.

Mr. **Sensenbrenner**. Let me keep going.

How about the student who gets some of his funds to pay the tuition from working in a federally funded public works project during the summer?

Mr. **Vera**. Let me say in fairness to the other witnesses—I think those questions are probably going to be answered by the Department of Education in terms of some of the regulations. But I think those are hypothetical.

Mr. **Sensenbrenner**. You just got 50 more "no" votes by the statement you made, because there are a lot of people up in the air on this particular piece of legislation that don't want the Department of Education sometime in the future to implement regulations. What they want to do is they want to know who is covered and who is not covered at the present time.

Mr. **Vera**. We don't believe they are covered.

Ms. **Greenberger**. I think the important thing really is that the *Grove City* decision in the first part of the decision, which is——

Mr. **Sensenbrenner**. I don't mean to interrupt you, but we are going to have to go to vote.

The question is not what the *Grove City* decision said, because this bill is designed to overturn the *Grove City* decision.

Under this piece of legislation, would an institution be covered, for example, if a student received funds under the GI bill, but did not receive any other direct Federal funds?

Mr. **Reid**. In my opinion, it would not.

Mr. **Sensenbrenner**. Thank you very much.

Chairman **Perkins**. Mr. Packard.

Mr. **Packard**. I have no questions.

Chairman **Perkins**. Let me compliment all the witnesses. To my way of thinking, you have all made excellent statements. You have demonstrated experience in the field. And I think everyone that has heard you realized that you know what you are talking about.

We hope to get this legislation out of the way tomorrow.

Thank you.

Ms. **Greenberger**. I do want to say one thing with respect to veterans benefits.

The *Bob Jones* decision under title VI had made very clear that veterans benefits, like student aid, do constitute aid to the school. That has been the law in the *Bob Jones* decision. So this bill would not change that in any way.

Chairman **Perkins**. Thank you very much.

[Whereupon, at 1:50 p.m., the subcommittee adjourned, subject to the call of the Chair.]

[Material submitted for inclusion in the record follows:]

American Farm Bureau Federation,
Washington, DC, June 4, 1984.

Hon. Carl D. Perkins,
U.S. House of Representatives,
Washington, DC.

Dear Representative Perkins: Farm Bureau members throughout the nation are firm believers and supporters of the Constitution, the Bill of Rights, and the basic precepts of our Republic, which encompass fair and nondiscriminatory treatment under the law for all citizens, regardless of race, national origin, age, or sex.

We are also firm believers in the private enterprise economic system and that property rights are an important part of civil rights. We are opposed to any further expansion of the power and authority of the federal government over state and local government, as well as the private sector.

As a general rule, Farm Bureau has not become involved in civil rights legislation. However, we are concerned that the broad, vague, and all-encompassing language contained in H.R. 5490, particularly in the definition of "recipient" of federal assistance, may be an open invitaion to the federal bureaucracy and the courts to bring virtually every public activity at all levels of government under the jurisdiction of the several statutes that would be amended by this legislation.

That is a serious enough threat to the integrity of state and local governments, but the language in this bill may be interpreted to bring under the regulation of the civil rights statutes a large portion of all private sector activity. Even individual farmers and ranchers who are recipients of various forms of public assistance or who "receive support" from govenment programs may be affected.

Further, these statutes provide for the rights of private action, with legal fees awarded to the prevailing party. Thus farmers and ranchers may find themselves defendants in thousands of lawsuits arising from employment practices, credit, marketing, and other activites that could be construed as covered by this legislation.

We do not oppose legislation to clarify the Court decision in *Grove City College* vs. *Bell.* However, we are opposed to the enactment of H.R. 5490 as it is now written.

We believe the possible implications and interpretations of the language contained in this bill need the full attention of every member of the House. This legislation deserves the benefit of full debate and disclosure that can come from a full-blown debate on the floor and full consideration of amendments that may be offered to narrow the scope and clarify the language in this bill.

Accordingly, we call upon members of the House to vote against the suspension of the rules for consideration of this bill. Surely the implications of the *Grove City* decision are not so intrusive and destructive of the purposes of civil rights laws as to require hasty consideration of a bill that goes far beyond the issues involved in that decision.

It may be that our fears as to the massive extension of federal regulation under this bill will not be borne out when the House has an opportunity to discuss the issues fully, but due process at least demands that the serious issues that have been raised about the language in this bill be thoroughly aired before the House proceeds with precipitous action.

Sincerely,

Robert B. Delano, *President.*

Prepared Statement of Sister Renee Oliver, O.S.U., Associate Director, Citizens for Educational Freedom

Thank you, gentlemen, for the opportunity to express my opinion on the proposed Civil Rights Act of 1984.

I am Sister Renee Oliver, Associate Director of Citizens for Educational Freedom, a non-partison, non-sectarian organization representing parents and other groups concerned with parents' rights in education, especially with their right to choose the kind of education they want for their children.

Our objection to the new Civil Rights Act has nothing to do with civil rights, which we strongly support for others as diligently as we pursue it for ourselves. It does, however, have everything to do with what we perceive as overkill, similar to an attempt to kill a rogue elephant with an atom bomb.

If the purpose of this legislation is to correct the decision of the Supreme Court in the Grove City College case so that Title IX of the Civil Rights Act of 1964 will apply to an entire college or university, then all that is necessary is that the language which has caused the confusion, namely "activities and programs" of a college be changed to read "the entire college or university". It would be a relatively simple matter.

But rather than deal directly with the problem at hand, this legislation redefines a "recipient" of Federal funds and it does so in such a broad way as to include just about everyone in the United States, from the independent truck driver who delivers federally subsidized milk to the local public school, to the owners of a "Mom and Pop" grocery store that accepts food stamps.

We know that it is not the intent of this legislation to be so all encompassing, but the words are there, and they would be pretty hard to argue down in a court of law, a place where more and more Americans are finding themselves these days.

As people who are already concerned about the continued encroachment of government into the everyday lives of its citizens, we are most concerned with the overkill of this piece of legislation. We therefore urge you to look at it not just with your civil rights eyes, but with your farsighted eyes that can see beyond the good that you wish to accomplish to what you are actually doing toward expanding the reach of this government for beyond what is needed, desired, or good for the civil rights of all our citizens.

PREPARED STATEMENT OF AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, WASHINGTON, DC

The American Federation of State, County, and Municipal Employees (AFSCME), a labor union representing more than one million public employees nationwide, takes this opportunity to endorse H.R. 5490, the Civil Rights Act of 1984. The legislation is necessary to reverse the severe restrictions placed on the scope of Title IX (which prohibits sex discrimination in education) by the Supreme Court in *Grove City College* vs. *Bell*.

In this case the Supreme Court was asked to decide whether a college is considered a "recipient" of federal financial assistance under Title IX by virtue of the fact that Pell Grants and Guaranteed Student Loans were provided to its students. While the Court agreed that Grove City College is indeed a recipient of federal assistance, it also held that only the "program or activity receiving federal financial assistance" (the student aid program in *Grove City*), rather than the entire recipient institution, is subject to Title IX.

Title IX in essence provides that "no person * * * shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance * * *." Since it was passed in 1972, Title IX has allowed more women to participate in intercollegiate sports, have access to athletic scholarships, gain enrollment in college, and earn a greater percentage of graduate and professional degrees granted in traditionally male fields. However, because of the Court's decision in *Grove City*, the effectiveness of Title IX as a bar to sex discrimination has been weakened.

Additionally, the Court's narrowing of the statutory definition of "program or activity" has severe implications for other civil rights statutes. Title VI of the Civil Rights Act of 1964 (prohibits discrimination based on race, color or national origin in all federally-assisted programs or activities), section 504 of the Rehabilitation Act of 1973 (prohibits discrimination against the handicapped in programs or activities receiving federal assistance), and the Age Discrimination Act of 1975 (prohibits discrimination based on age in programs or activities receiving federal assistance), all contain the same language as Title IX. Indeed, the Reagan Administration has already indicated it will utilize a similar analysis in moving forward in its "enforcement" endeavors. Thus, the reach of these civil rights laws may be limited since any recipient of federal financial assistance may be able to shield itself from discrimination charges by directing federal support to some programs and not others.

AFSCME has consistently supported and worked for constitutionally guaranteed rights for all Americans. We are currently involved in cases to bring an end to sex based wage discrimination. AFSCME therefore urges you to support The Civil Rights Act of 1984 which restores Title IX to the broad coverage which marked its enforcement prior to *Grove City*, and clarifies the language of Title VI, Section 504, and the Age Discrimination Act.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,
Washington, DC, May 18, 1984.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, DC.

Hon. CARL D. PERKINS,
Chairman, Committee on Education and Labor, U.S. House of Representatives, Washington, DC.

DEAR CONGRESSMEN RODINO AND PERKINS: We are writing to you on behalf of the Lawyers' Committee for Civil Rights Under Law, an organization formed in 1963 at the specific request of President John F. Kennedy to involve the private bar in the struggle to achieve equal justice for all in the United States. Over the past twenty-plus years, the Committee has played a significant role in judicial and legislative efforts to end discrimination on the invidious bases of race, national origin, sex and handicap.

The Lawyer's Committee strongly supports H.R. 5490, which has been referred to both of your Committees, where we understand it will shortly receive consideration. This legislation would amend the language of three important federal civil rights laws (Title VI of the Civil Rights Act of 1964, Title IX of the Education Act of 1973) in order to change the interpretation of current provisions announced by the Supreme Court in *Grove City College* v. *Bell,* 52 U.S.L.W. 4283 (U.S. February 28, 1984).

Although the *Grove City* case directly involved only Title IX and its ban on sex discrimination by recipients of Federal Financial Assitance, because Title IX (and Section 504) were explicitly modeled upon Title VI, the Supreme Court's decision has critical implications for the other statutes as well. As the Lawyers' Committee said in the Brief *Amicus Curiae* which we filed with the Supreme Court in *Grove City,* a ruling in favor of the college (which as eventually issued by the Court) "would have grave implications for the scope of the antidiscrimination requirement in Title VI of the 1964 Civil Rights Act."

The Court's ruling that recipients of Federal Financial Assitance are prohibited from discriminating only in the narrowly defined "program or activity" for which the federal funds are made available gives school systems and postsecondary institutions and unacceptably broad latitude to operate on a discriminatory basis. For examine, if the Court's wooden approach to Title IX were applied equally mechanically to Title VI, a school system which received federal money to support vocational education programs in its high schools might be viewed as not violating the law even if its elementary schools were recially segregated. The Court's decision totally ignores the fact that receipt of Federal Financial Assistance for one "program or activity" may well free up non-Federal funds to be used in other programs or activities in the same institution.

We believe that the Supreme Court's interpretation of the Title IX language has produced a result which is wrong as a matter of policy. The swiftest way to avoid further injustice is to amend the statutory language to nullify that interpretation. We believe that H.R. 5490 does just that, in straightforward and efficient terms. We urge your Committees to expedite consideration and passage of this measure by the House of Representatives.

Very truly yours,

ROBERT H. KAPP,
FRED N. FISHMAN,
Cochairmen.

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